Supreme Court, U.S.
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In The
Supreme Court of the United States

JENNIFER GRATZ AND
PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT,
AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE

CASE NO.:
97-CV-75231-DT
HON.
PATRICK J. DUGGAN

OPINION

MARTINEZ, LARRY
CRENSHAW, HARRY J.
WILLIAMS, PATRICIA
SWAN-BROWN, KAREN A.
MCDONALD, LINDA A.
HARRIS, DEANNA A.
SMITH, ALICE BRENNAN,
IVY RENE CHARMICHAEL,
SARAH L. DUBOSE, INGER
DAVIS, BARBARA DAW-
SON, ROY D. HARLIN,
WYATT G. HARRIS,
GEORGE C. GIPSON,
SHAWN R. REYNOLDS,
AND CITIZENS FOR AF-
FIRMATIVE ACTION'S
PRESERVATION,

Defendant-Intervenors.

OPINION

(Filed Dec. 13, 2000)

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various university officials asserting that the University's College of Literature, Science, and the Arts ("LSA") had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions. Plaintiffs seek injunctive, declaratory, and monetary relief.

On December 23, 1998, this Court issued an Order bifurcating the action into a "liability" and "damages" phase. This matter is currently before the Court on cross-motions for summary judgment with respect to the

"liability" phase only, which has been previously defined as "whether [D]efendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution,"[1] and has been specifically limited to Plaintiffs' request for injunctive and declaratory relief.[2] Oral argument was heard on November 16, 2000.

For the reasons set forth herein:

Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years shall be declared unconstitutional;

The University Defendants' motion for summary judgment shall be granted with respect to the LSA's admissions programs for 1999 and 2000;

Plaintiffs' request for injunctive relief shall be denied;

---

[1]. Because Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause," it is not necessary for the Court to engage in a separate analysis regarding Plaintiffs' claims under Title VI. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S. Ct. 2733, 2746, 57 L. Ed. 2d 750 (1978).

[2] In the same Order, this Court certified a class consisting of:

> Those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission.

(12/23/98 Op. at 15).

Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity shall be granted; and

The Board of Regent's motion for summary judgment on grounds of Eleventh Amendment immunity shall be denied.[3]

Background

The University of Michigan ("University") is a public institution of higher education located in Ann Arbor, Michigan. According to Defendants, admission to the University is selective, meaning that many more students apply each year than can be admitted. The University received some 13,500 applications for admission to the LSA in 1997, from which it elected to enroll 3,958 freshmen. Among its stated admissions objectives, the University strives to compose a class of students from diverse races, ethnicities, cultures, and socioeconomic backgrounds. The University views diversity as an integral component of its mission. According to the University, diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." (Jt. Summ. Facts at 1).[4] To facilitate the University's goal of

[3] This Opinion and its corresponding order shall address only the University Defendants' arguments regarding diversity. The Intervenor-Defendants' arguments regarding remedial measures shall be addressed in a supplemental opinion and order.

[4] The parties have provided the Court with a Joint Summary of Undisputed Facts Regarding Admissions Process, which was filed on December 13, 2000.

diversity, it is undisputed that the LSA employs race as a factor in its admissions decisions.

Plaintiffs Jennifer Gratz and Patrick Hamacher are Caucasion residents of the State of Michigan, both of whom applied for admission into the 1995 and 1997 classes of the LSA, respectively. On January 19, 1995, Plaintiff Gratz was notified that a final decision regarding her admission had been delayed until early to mid April 1995, as she was considered by the LSA as "well qualified, but less competitive than the students who ha[d] been admitted on first review." (*Id.*). On April 24, 1995, Plaintiff Gratz was notified that the LSA was unable to offer her admission. Thereafter, Plaintiff Gratz enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Similarly, Plaintiff Hamacher was notified on November 19, 1996, that a decision regarding his admission was "postponed" until mid-April of 1997. According to the LSA's letter, a decision regarding Plaintiff Hamacher had been postponed because, "[a]lthough [his] academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission." (*Id.* at 2). On April 8, 1997, Plaintiff Hamacher's admissions application was rejected. Thereafter, Plaintiff Hamacher enrolled at Michigan State University.

The Defendant-Intervenors are seventeen African American and Latino students who have applied for, or intend to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American

and Latino students in Michigan. According to Defendant-Intervenors, the resolution of this case directly threatens African American and Latino students' access to higher education.

Plaintiffs have filed a motion for summary judgment asserting that the LSA's use of race as a factor in admissions decisions violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Protection Clause of the United States Constitution. The University Defendants have filed a cross-motion for summary judgment asserting that the LSA's use of race as a factor in admissions decisions is, as a matter of law, constitutional. Defendant-Intervenors have filed responses to both motions, supporting the University Defendants' assertion that the LSA's admissions policies are constitutional.

Standard of Review

Summary judgment is proper only if there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 709 (6th Cir. 2000); *see also* FED. R. CIV. P. 56(c). There is no genuine issue of material fact for trial unless, by viewing the evidence in a light most favorable to the nonmoving party, a reasonable jury could "return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On a motion for summary judgment, the moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53. The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994). The nonmoving party must present significant probative evidence in support of its opposition to the motion for summary judgment. *Moore v. Philip Morris Co., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). If, after adequate time for discovery, the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53.

Discussion

As previously mentioned, this phase of the litigation has been explicitly limited to the issue of "liability," defined as "whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," as well as Plaintiffs' request for injunctive and declaratory relief. (12/23/98 Op. at 15; 5/1/00 Op. & Order at 4). Specifically, Plaintiffs seek a declaratory judgment that the LSA's admission policies and practices for the academic years 1995 through the present violate Plaintiffs' rights under the Constitution and 42 U.S.C. §§ 1981, 1983, and 2000d. Without such a declaration, Plaintiffs' claims for monetary relief fail. Plaintiffs further seek an order permanently enjoining the LSA from engaging in illegal, racially discriminatory admissions practices in the future.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. The "central mandate" of the Fourteenth Amendment "is racial neutrality in governmental decisionmaking." *Miller v. Johnson,* 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995) (citing *Loving v. Virginia,* 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 191-92, 85 S. Ct. 283, 287-88, 13 L. Ed. 2d 222 (1964)). "The basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Id.* (quoting *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S. Ct. 2733, 2748, 57 L. Ed. 2d 750 (1978) (Powell, J.)). Accordingly, the Supreme Court has explicitly clarified that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995).

Two interests have been asserted in support of the LSA's race conscious admissions policies. The University Defendants assert that the LSA has a compelling interest in the educational benefits that result from having a diverse student body, whereas the Defendant-Intervenors assert that the LSA has a compelling interest

in remedying the University's past and current discrimination against minorities.[5] Therefore, the two issues this Court must decide in resolving the parties' motions for summary judgment are: (1) whether Defendants have asserted a compelling governmental interest in support of the LSA's use of race and (2) whether the measures by which the LSA has used race as a factor in admissions decisions were narrowly tailored to serve such interest.

Both the Plaintiffs and the University Defendants have agreed to the material facts relating to the mechanics of the LSA's admission policies, and that the Court has, in the record currently before it, all the evidence they wish to present. Therefore, both Plaintiffs and the University Defendants agree there is no need for a trial with respect to the issue of whether diversity constitutes a compelling interest under strict scrutiny, and whether the LSA's admissions programs were narrowly tailored to achieving that interest, and that, based upon the record before the Court, such issues may be resolved by summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Diversity Rationale

Both parties assert that with respect to the University Defendants' "diversity" rationale, the Supreme Court's decision in *Regents of the University of California v. Bakke,*

[5] Only the Defendant-Intervenors have asserted that the LSA's admissions policies serve a remedial purpose. The University Defendants have never justified the LSA's race-conscious admissions policies on remedial grounds.

438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), governs this dispute. In support of their motion for summary judgment, the University Defendants, supported by Defendant-Intervenors and a number of amici, contend that under Justice Powell's decision in *Bakke,* the University has a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse student body. The University Defendants also contend that under *Bakke,* the LSA's admissions policies were properly tailored to achieve the University's stated interest in diversity.

Plaintiffs, however, contend that Justice Powell's decision in *Bakke* has never garnered a majority of support from the Justices and that subsequent Supreme Court cases have confirmed that "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admissions process. In the alternative, Plaintiffs contend that even if this Court were to find "diversity" to be a sufficiently compelling interest, they are nonetheless entitled to summary judgment because the manner in which the LSA used race in admissions decisions for the years at issue in this case, 1995 through the present, is inconsistent with that specifically endorsed by Justice Powell in *Bakke.*

1. The "Bakke" Decision

In *Bakke,* a rejected applicant challenged the University of California at Davis Medical School's admissions program, which consisted of two systems: a regular admissions system for non-minority applicants, and a special admissions system strictly for minorities. *Bakke,* 438 U.S. at 273-75, 98 S. Ct. at 2739-40. In contrast to the regular

admissions system, the special minority admissions system operated with a separate committee, a majority of whom were members of minority groups. Special applicants were rated by the special committee in a manner similar to the regular admissions system, except that the special applicants did not have to meet the 2.5 minimum GPA applied to non-minority applicants.

Under the university's special admissions system, the special applicants were never compared against the non-minority applicants. The special admissions committee would continue to recommend special applicants for admission until a specific number of minority applicants were admitted, which was predetermined by faculty vote. For example, in 1973 and 1974, sixteen out of the one hundred available seats were reserved for special applicants.

According to the university, its special admissions system served the purposes of: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' (ii) countering the effects of societal discrimination, (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* at 306, 98 S. Ct. at 2756-57.

The Supreme Court of California sustained the applicant's challenge, holding that the university's admission program violated the California Constitution, Title VI, and the Equal Protection Clause of the Fourteenth Amendment. On appeal, the United States Supreme Court, through a majority formed by Justices Powell, Stevens, Burger, Stewart and Rehnquist, affirmed the

California Supreme Court's finding that the university's special admissions system was invalid, as was its order directing the university to admit the respondent to the Medical School. The Supreme Court also, through a different majority formed by Justices Powell, Brennan, White, Marshall, and Blackmun, reversed the California Supreme Court's order enjoining the university from ever considering race in making admissions decisions. An examination of the separate opinions in *Bakke*, however, clearly illustrates that there were no clear grounds upon which a majority of the Court agreed in reaching their respective decisions.

Justice Powell's Opinion

Justice Powell, writing solely for himself, supplied the pivotal vote in both affirming the California Supreme Court's finding that the university's admission program was unlawful, and reversing the California Supreme Court's order "enjoining [the university] from according any consideration to race in its admission process." *Id.* at 272, 98 S. Ct. at 2738.

Applying strict scrutiny, Justice Powell found that to the extent that the university's purpose was to "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected, not as insubstantial, but as facially invalid." *Id.* at 307, 98 S. Ct. at 2757. Justice Powell also rejected the university's proffered interests in countering the effects of societal discrimination and improving the delivery of healthcare to disadvantaged communities. *Id.* at 307-10, 98 S. Ct. at 2757-59.

However, Justice Powell found that the university's fourth goal, "the attainment of a diverse student body," was "clearly" a "constitutionally permissible goal for an institution of higher education." *Id.* at 311-12, 98 S. Ct. at 2759. Relying upon the "four essential freedoms" that constitute "academic freedom," *i.e.* "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,'" Justice Powell concluded that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 312, 98 S. Ct. at 2759 (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring)). According to Justice Powell, "[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body." *Id.* at 312, 98 S. Ct. at 2760. Furthermore, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313, 98 S. Ct. at 2760.

According to Justice Powell, a university's "interest in diversity is compelling in the context of a university's admissions program," in which "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." *Id.* at 314, 98 S. Ct. at 2760-61.

Justice Brennan's Opinion

Applying intermediate scrutiny, Justice Brennan, joined by Justices White, Marshall, and Blackmun, found that the university's articulated purpose of remedying the

effects of past societal discrimination was "sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities."[6] *Id.* at 362, 98 S. Ct. at 2784.

Justice Stevens's Opinion

Based upon the fact that *Bakke* was not a class action, but rather a "controversy between two specific litigants," Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, viewed "the question of whether race can ever be used as a factor in an admissions decision" as an issue not before the Court. *Id.* at 408 & 411, 98 S. Ct. at 2808 & 2809. Justice Stevens also declined to address the issue on constitutional grounds, relying solely upon Title VI's prohibition instead, which Justice Stevens viewed as "crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 418, 98 S. Ct. at 2813.

2. Diversity as a Matter of Law

In support of their motion for summary judgment, the University Defendants contend that under Justice Powell's reasoning in *Bakke,* the University has, as a matter of law, a compelling governmental interest in the educational

[6] As noted *supra,* the Supreme Court has since clarified that all racial classifications are subject to strict scrutiny review. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

benefits that flow from a racially and ethnically diverse student body.[7] According to the University Defendants, Justice Powell's opinion in *Bakke* stands as the narrowest grounds offered in support of the judgment in that case and is therefore also binding precedent on this Court.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976)). As explained by the Sixth Circuit, "[w]here a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land." *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (6th Cir. 994).

It is clear that a majority of the Justices in *Bakke* expressly agreed that the California Supreme Court erred in enjoining the university from ever considering race in its admissions programs. Therefore, to the extent that the University Defendants assert *Bakke*'s holding to be that "'a properly devised admissions program involving the competitive consideration of race and ethnic origin'" is

[7] Defendant-Intervenors join in the University Defendants' assertion that racial diversity is a compelling governmental interest in the context of higher education. (Def.-Intervenors' 8/11/00 Resp. to Defs.' Mot. at 3-5).

constitutional, this Court agrees. *See Bakke,* 438 U.S. at 320, 98 S. Ct. at 2763; *see also Minnick v. California Dep't of Corr.,* 452 U.S. 105, 115 & n.17, 110 S. Ct. 2211, 2217 & n.17, 68 L. Ed. 2d 706 (1981) (recognizing that the opinions of Justices Brennan, White, Marshall, Blackmun, and Powell "unequivocally stated that race may be used as a factor in the admissions process in some circumstances"); *Oliver v. Kalamazoo Bd. of Educ.,* 706 F.2d 757, 763 (6th Cir. 1983) (citing *Bakke* for proposition that "affirmative action admission programs of educational institutions may take race into account"). What is less clear, however, is whether five Justices implicitly agreed that diversity can be a compelling interest in the context of higher education, *i.e.,* whether universities have a compelling interest in the educational benefits that flow from a racially and ethnically diverse student body.

It is clear that no five Justices in *Bakke* expressly held that diversity was a compelling interest under the Equal Protection Clause. The most that can be garnered from *Bakke*'s splintered decision is that five Justices reached the same conclusion, *i.e.* that universities may take race into account in admissions when done so properly, for separate, unrelated reasons.

The University Defendants, relying upon *Smith v. University of Washington,* Nos. 99-35209, 99-35347, 99-35348, 2000 WL 1770045 (9th Cir. 2000), contend that Justice Powell's opinion is the "narrowest opinion" of the

Court and therefore, diversity is a compelling governmental interest as a matter of law.[8]

While this Court does not necessarily agree with the Ninth Circuit's conclusion that Justice Powell's "analysis is the narrowest footing upon which a race-conscious decision making process could stand," *Smith,* 2000 WL 1770045 at *10, this Court reaches the same ultimate conclusion as the Ninth Circuit, *i.e.,* that under *Bakke,* diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning.[9]

Plaintiffs, relying on the Fifth Circuit's decision in *Hopwood v. State of Texas,* 78 F.3d 932 (5th Cir. 1996), *cert. denied,* 518 U.S. 1033, 116 S. Ct. 2581, 135 L. Ed. 2d 1095 (1996), and more recently, the United States District Court for the Southern District of Georgia's decision in *Johnson v. Board of Regents of University System of Georgia,* 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000), contend that, as a matter of law, "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admission process. This Court disagrees.

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[8] In their briefs, the University Defendants rely on the district court's opinion in *Smith,* No. C97-3352 (W.D. Wash. Feb. 12, 1999). On December 4, 2000, however, the Ninth Circuit affirmed the district court's decision.

[9] Recognizing that neither the Supreme Court nor the Sixth Circuit have definitively held that diversity can never be a compelling interest under strict scrutiny, this Court is satisfied that the University's argument remains viable.

In *Hopwood,* two of the three judges on the Fifth Circuit panel held "that any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Hopwood,* 78 F.3d at 944. The Fifth Circuit reasoned that by explicitly agreeing with a portion of Justice Powell's opinion, but remaining silent in regard to Justice Powell's diversity rationale, the Justices who joined Justice Brennan's opinion in *Bakke* "implicitly rejected" Justice Powell's position regarding diversity. *Id.* This Court, however, believes that the panel in *Hopwood* reads too much into the other Justices' silence regarding Justice Powell's diversity rationale. It is just as likely that the other Justices felt no need to address the issue of diversity based upon their finding that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination.

For example, Justice Brennan's silence regarding diversity could just as easily be interpreted as "implicit approval" that, in an appropriate case, diversity may constitute a compelling governmental interest. In fact, in *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 568, 119 S. Ct. 2997, 3010, 111 L. Ed. 2d 445 (1990), *rev'd on other grounds, Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), Justice Brennan specifically described the Supreme Court's decision in *Bakke* as recognizing that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." In this Court's opinion, Justice Brennan's statement in *Metro Broadcasting* further supports a conclusion that his silence regarding the diversity interest in *Bakke* was not an implicit

rejection of such an interest, but rather, an implicit approval of such an interest. As the Ninth Circuit recognized in *Smith:*

> True it is that Justice Brennan did not specifically say that "race" could be used to achieve student body diversity in the absence of any societal discrimination, but, then, there was no need for him to do so in light of his view about past societal discrimination. Yet, we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding.

Smith, 2000 WL 1770045 at *10.

Although this Court agrees that since *Bakke,* no Supreme Court decision has explicitly accepted the diversity rationale under strict scrutiny, this Court does not agree that under recent Supreme Court precedent, the diversity interest can never constitute a compelling state interest, especially in the context of higher education. In fact, none of the cases relied upon by the Fifth Circuit involved the issue of whether the educational benefits that flow from a racially and ethnically diverse student body can ever constitute a compelling governmental interest in the context of higher education, most likely because the Supreme Court has not been faced with this precise issue since *Bakke. See Hopwood,* 78 F.3d at 944-45; *Johnson,* 106 F. Supp. 2d at 1367-70.

In *Hopwood,* the Fifth Circuit relied upon the Supreme Court's decision in *City of Richmond v. J.A. Croson,* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), in reaching its conclusion that diversity can never justify the use of racial classifications. *Croson,* however, involved a

minority set-aside program in the context of government construction contracts. This Court agrees with Judge Wiener's concurring opinion in *Hopwood* that the public graduate or professional school context is distinguishable from the employment, minority business set-aside, and redistricting contexts in that, unlike the other cited contexts, the higher education context implicates "the uneasy marriage of the First and Fourteenth Amendments."[10] *Hopwood*, 78 F.3d at 965 n.21 (Wiener, J., concurring).

As Justice Powell recognized in *Bakke*, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312, 98 S. Ct. at 2759. This "freedom" has always been viewed as including "[t]he freedom of the university to make its own judgments as to education," including "the selection of its student body." *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring); *Keyishian v. Board of*

[10] As the First Circuit recognized in *Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998):

> In the education context, *Hopwood* is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit. *See Hopwood v. State of Texas*, 84 F.3d 720, 721 (5th Cir. 1996) (Politz, C.J., with whom King, Wiener, Benavides, Stewart, Parker, and Dennis, JJ., joined, dissenting from denial of rehearing en banc). The question that divided the Fifth Circuit centered on the precedential value of Justice Powell's controlling opinion in *Bakke*. The panel in *Hopwood* pronounced that opinion dead. The dissenting judges countered that the reports of *Bakke*'s demise were premature.

Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967)).

Moreover, that section of Justice O'Connor's opinion in *Croson* that is most often cited for the proposition that race-based classifications must be "strictly reserved for remedial settings" did not enjoy a majority of the Court. *Croson*, 488 U.S. at 493, 109 S. Ct. at 722. In his concurring opinion, Justice Stevens specifically disagreed with the premise that seemed to underlie Justice O'Connor's opinion, *i.e.*, "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." *Id.* at 511, 109 S. Ct. at 731. In Justice Stevens's opinion, Justice O'Connor's approach "overlook[ed] the potential value of race-based determinations that may serve other valid purposes." *Id.* at 511 n.1, 109 S. Ct. at 731 n.1.

In short, this Court is not convinced that recent Supreme Court precedent has established, as a matter of law, that the consideration of race in an attempt to attain the educational benefits that flow from a racially and ethnically diverse student body in the context of higher education can never constitute a compelling interest under strict scrutiny. To that end, this Court agrees with Judge Wiener's concurring opinion in *Hopwood* that applicable Supreme Court precedent has never held "squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest." *Hopwood*, 78 F.3d at 964 (Wiener, J., concurring); *see also Smith*, 2000 WL 1770045 at *11

("For now, therefore, it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (noting that issue of whether diversity constitutes a compelling interest remains unresolved); *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 258 (D. Mass. 1999) (rejecting plaintiff's contention on motion for preliminary injunction that diversity can never be compelling governmental interest); *Hunter v. Regents of Univ. of Cal.*, 971 F. Supp. 1316, 1324-27 (C.D. Cal. 1997) (rejecting plaintiff's contention that remedying past discrimination is only compelling state interest). Accordingly, this Court is satisfied that, if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such benefits are compelling under strict scrutiny analysis.

The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body. According to Patricia Y. Gurin, Professor of Psychology at the University of Michigan and Interim Dean of the LSA, "[s]tudents learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." (Gurin Rep. at 3; *see also* U.S. Br. at 20-24; Association of American Law Schools

("ALS")[11] Br. at 6-10). Diversity in higher education also serves to break "patterns of racial segregation and separation historically rooted in our national life." (*Id.*).

Gurin reports that "multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan" show that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." (*Id.* at 5). Such students were also "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of common ground." (*Id.* at 5-6; *see also* ALS Br. at 11-13; American Council on Education ("ACE")[12] Br. at 9-11).

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[11] The Association of American Laws Schools, National Association of State Universities and Land Grant Colleges, Committee on Institutional Cooperation (an academic consortium including Indiana University, Michigan State University, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, the University of Chicago, the University of Illinois, the University of Iowa, the University of Michigan, the University of Minnesota, and the University of Wisconsin-Madison), and Wayne State University have joined in one amicus brief in support of the University, together representing over 360 institutional members of the professional higher education community.

[12] The American Council on Education is joined by twenty-four other associations, councils, and other groups representing the higher education community throughout the United States.

Members of heterogeneous working groups also offer more creative solutions to problems than do homogeneous groups, and show a greater potential for critical thinking because heterogeneity "eliminates a problem termed 'group think,' an organizational situation in which group members mindlessly conform." (*Id.* at 17) (internal citation omitted). Students who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills. (*Id.* at 35-36 & Tables C1, C2, M1, M2, I1). Gurin also concludes that on average, students who attend more diverse institutions exhibit a greater "intellectual engagement and motivation index" and a greater "citizenship engagement index." (*Id.*, Figs. 3 & 4).

A number of amici have filed briefs concurring with the University that diversity results in a richer educational experience for students.[13] In support of its position, the United States cites a study by Alexander Astin, Director of the Higher Education Research Institute at the University of California, in which Astin associates diversity with increased satisfaction in most areas of the college experience and an increased commitment to promoting

[13] Along with the ALS and ACE, the following have filed amicus briefs in support of the University's position: the United States, the State of Ohio, the Michigan Attorney General, General Motors Corporation, Steelcase, Inc., joined by nineteen other global corporations, and the National Association of Social Workers, joined by the Council on Social Work Education, the Association of Baccalaureate Social Work Program Directors, Inc., and the Group for the Advancement of Doctoral Education in Social Work.

racial understanding and participation in cultural activities, leadership, and citizenship. (U.S. Br. at 20-21; *see also* ALS Br. at 6; ACE Br. at 15).

The over 360 institutions represented by the Association of American Law Schools assert that they have learned through their extensive experience in the educational realm that the quality of education for all students is greatly enhanced when student bodies include persons of diverse backgrounds, interests, and experiences, including racial and ethnic makeups. (ALS Br. at v). According to these institutions, a decision adverse to the University Defendants would significantly undermine their ability to provide the highest quality of academic experience and to prepare their students to effectively contribute to society after graduation. (*Id.* at vi).

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is "good, important, and valuable." Counsel for Plaintiffs, however, contends that "good, important, and valuable" is not enough, and that the diversity rationale is too amorphous and ill-defined, and "too limitless, timeless, and scopeless," to rise to the level of a compelling interest. According to counsel for Plaintiffs, the University's diversity rationale has "no logical stopping point" but rather is a "permanent regime" in direct conflict with the strict scrutiny standard.

This Court, however, is not convinced that what may be too amorphous and ill-defined in other contexts, *i.e.* the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education. In this Court's opinion, the fact that the University cannot articulate a set number or percentage of minority students that would constitute the requisite level of diversity does not, by itself, eliminate diversity as a potentially compelling interest.

Furthermore, unlike the remedial setting, diversity in higher education, by its very nature, is a permanent and ongoing interest. As previously noted, diversity is not a "remedy." Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that Universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when universities are able to achieve the desired diversity without resort to racial preferences. Such an occurrence, however, would have no affect on the compelling nature of the diversity interest. Rather, such an occurrence would affect only the issue of whether a university's race-conscious admissions program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such interest.

The only argument rebutting the University Defendants' assertions regarding the educational benefits of a

diverse student body comes from the National Association of Scholars ("NAS"), which has filed a brief as amicus curiae in support of Plaintiffs. Contrary to the amici in support of the University Defendants, the NAS contends that "*intellectual* diversity bears no obvious or necessary relationship to *racial* diversity." (NAS Br. at 3). NAS specifically takes issue with the studies relied upon by the ALS, contending that such studies really report that "outcomes are generally not affected" by racial diversity on campus. (*Id.* at 6-7).

NAS also asserts that none of the variables Gurin uses in her studies as proxies for racial diversity on college campuses actually requires the presence of other-race students on campus. (*Id.* at 8). For example, NAS asserts that Gurin relies on a student's attendance at an ethnic studies course coupled with either participation in a racial/cultural awareness workshop or a discussion regarding racial issues. (*Id.*). As NAS points out, neither of these necessarily requires the presence of other-race students.

NAS also attacks Gurin's study as providing no indication of the number of minority students that are needed to achieve the effects reported. (*Id.* at 9). According to NAS, "[i]t is possible that the positive outcomes that Gurin catalogues do not require any more racial diversity than that which would occur without racial preferences." (*Id.*). This argument, however, does not go to the core issue of whether the educational benefits that flow from a diverse student body constitute a compelling governmental interest, but rather, whether the means employed to achieve that interest are narrowly tailored.

This Court is persuaded, based upon the record before it, that a racially and ethnically diverse student body

produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny.

3. Narrowly Tailored Analysis

Having determined that the educational benefits flowing from a racially and ethnically diverse student body are a sufficiently compelling interest to survive strict scrutiny, the Court must now determine whether the LSA's admissions policies for the years at issue (1995-present) were narrowly tailored to achieving that interest.

Although Justice Powell found diversity to be a compelling interest in the context of a university's admissions program, Justice Powell ultimately found that the particular admissions program at issue in *Bakke* was not a narrowly tailored means of achieving such interest and accordingly, the program was nonetheless unconstitutional. According to Justice Powell, the fatal flaw in the University of California's program was that:

> It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Bakke, 438 U.S. at 318, 98 S. Ct. at 2763. However, "[i]n enjoining [the university] from ever considering the race of

any applicant," the California Supreme Court had "failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* For that reason, Justice Powell concluded that so much of the California court's judgment that enjoined the university from *any* consideration of an applicant's race had to be reversed.[14]

In contrast to the University of California's special admissions system, Justice Powell cited Harvard's admissions program as an example of how race could properly be taken into account in an effort to achieve diversity. *Id.* at 316, 98 S. Ct. at 2762. As Justice Powell described Harvard's admissions program:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to

[14] In contrast, Justice Brennan found that there was "no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants." *Bakke*, 438 U.S. at 378, 98 S. Ct. at 2793.

> exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id. at 317-18, 98 S. Ct. at 2762.

According to Justice Powell, such a program was appropriate because it "treat[ed] each applicant as an individual in the admissions process." *Id.* at 318, 98 S. Ct. at 2762. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant." *Id.* An applicant whose qualifications had been weighed "fairly and competitively" had no basis to complain of unequal treatment under the Fourteenth Amendment. *Id.*

Although the Harvard plan spoken of approvingly by Justice Powell did not set target-quotas for the number of

minorities to be admitted in a given year, the plan clearly used race as a factor in admissions. *Id.* at 316, 98 S. Ct. at 2761-62. Therefore, to the extent that Plaintiffs contend that race can never be used as a factor during admissions decisions, their argument must be rejected.

It is also clear that under the Harvard plan, "race may tip the balance in [an applicant's] favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.* at 316, 98 S. Ct. at 2761. Therefore, in some cases, an applicant may constitutionally be granted admission over another applicant solely on account of his race.

Furthermore, a university may "pay[ ] some attention to distribution among many types and categories of students," as more than a "token number of blacks" is necessary to fully achieve the educational benefits that flow from a racially and ethnically diverse student body. *Id.* at 316-17, 98 S. Ct. at 2762. As Harvard explained in regard to its admission program:

> In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view,

> backgrounds and experiences of blacks in the United States.

Id. at 323, 98 S. Ct. at 2765.

As is clear from Justice Powell's opinion in *Bakke*, a university's interest in achieving the educational benefits that flow from a diverse student body does not justify an admissions program designed to admit a predetermined number or proportion of minority students. Instead, a university must carefully design its system to fall between these two competing ends of the spectrum, *i.e.*, between a system that completely fails to achieve a meaningful degree of diversity, under which the benefits associated with a diverse student body will never be realized, and a rigid quota system, which is clearly unconstitutional under Justice Powell's opinion in *Bakke*.

In striving to achieve such a system, "race or ethnic background may be deemed a 'plus' in a particular applicant's file," as long as this plus "does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317, 98 S. Ct. at 2762. As Justice Powell explained with reference to the Harvard plan, an admissions program that takes race into consideration must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* at 317, 98 S. Ct. at 2761. It is exactly because race need not necessarily be accorded the same weight as other objective factors that, in some instances, "race may tip the balance in an applicant's favor." *Id.* at 316, 98 S. Ct. at 2761.

The instant action involves the LSA's admissions programs from 1995 through the present. In 1995 and 1996, admission decisions were based primarily on a set of guideline tables referred to as grids, with GPA 2 ranges represented on the vertical axis, and ACT/SAT scores represented on the horizontal axis.[18] In 1995, four grids were used: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. In 1996 only two grids were used: (1) in-state and legacy applicants and (2) out-of-state applicants – with non-minority applicant action codes listed in the top row of the grid's cells, and minority action codes listed in the bottom row. In 1997, the same grids as in 1996 were used. However, in 1997, the LSA also added .5 to under-represented minority applicants' GPA 2 scores.

From 1998 through the present, the LSA has used a 150 point system, under which admission decisions were generally determined by the applicant's rank on the 150 point scale. Under-represented minority applicants automatically receive 20 points based upon their membership in one of the identified under-represented minority categories. In 1999 and 2000, the LSA also added a system whereby certain applicants, including under-represented minority applicants, could be "flagged," thereby keeping

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[18] An applicant's GPA 2 was calculated by adjusting the applicant's high school GPA based upon several factors, including the quality of the applicant's high school, the strength of the applicant's high school curriculum, any unusual circumstances, the applicant's geographical residence, and the applicant's alumni relations, if any.

such applicants in the review pool for further consideration.

Beyond the fact that rigid quotas are impermissible, Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions. Furthermore, in situations such as this, it is often a thin line that divides the permissible from the impermissible. Applying the principles set forth by Justice Powell in *Bakke*, this Court is satisfied that when examined in its entirety, the LSA's current admissions program (1999-present) represents a permissible use of race. At the same time, however, the Court is satisfied that although the LSA views its current system as "chang[ing] only the mechanics, not the substance" of its prior systems, its prior systems, when examined in their entirety, cross that thin line from the permissible to the impermissible.[16]

A. The LSA's Current System (1999-Present)

Foremost in the Court's decision that the LSA's current admissions program is constitutional is the fact that the LSA's current program does not utilize rigid

[16] It is understandable that the LSA does not contend that there is any "substantive" difference between its current and prior admissions programs. To acknowledge a substantive difference in such programs would give some support to Plaintiffs' claims that the admissions programs in effect from 1995 through 1998 were not "narrowly tailored." Furthermore, the University Defendants' contention that "only the current system can form the basis for [injunctive relief]," and their arguments in support of this contention, (Defs.' 8/11/00 Br. at 92), suggest that there are some significant differences between the LSA's current admissions programs and those used from 1995 through 1998.

quotas or seek to admit a predetermined number of minority students. Therefore, the LSA's current program does not contain the fatal flaw identified by Justice Powell in *Bakke*. Instead, race is taken into account in two ways under the LSA's current program. First, admissions counselors may assign each under-represented minority applicant twenty points in calculating their selection index score on account of their race. Second, under the LSA's current program, counselors may "flag" applicants that possess certain qualities or characteristics the LSA deems important to the composition of its freshman class, one of which is "under-represented race," thereby keeping an applicant who may not necessarily pass the LSA's initial admit threshold in the review pool for further consideration.[17] Such uses of race, however, operate as nothing more than the "plus" spoken of with approval by Justice Powell in *Bakke*.

In response, Plaintiffs contend that the LSA's practice of adding twenty points to under-represented minority applicants' selection index scores really operates as the functional equivalent of a quota. Justice Powell, however, rejected essentially the same argument in *Bakke* explaining:

> It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated – but no less effective – means of according racial preference than the Davis program. A facial intent to

[17] Other qualities or characteristics include high school class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and geography.

discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329, 64 S. Ct. 1023, 1025, 88 L. Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. *See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).

Id. at 318-19, 98 S. Ct. at 2762-63.

Minority applicants are not insulated from review by virtue of these twenty points any more than other applicants are insulated from review by virtue of the six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, or twenty points awarded for athletes. In fact, the Court notes that in certain circumstances, these points may be combined for a total of up to forty. The fact that these points may "tip the balance" in favor of a particular

applicant, however, does not necessarily lead to a conclusion that such applicants have been insulated from competition in the sense that Justice Powell spoke of in *Bakke*.

The Court agrees that in certain situations, a preexisting commitment to a fixed preference may translate into an exact proportion of the favored group being selected. This is most clearly illustrated by programs in which a preference is only available for one factor, for example race. However, under the LSA's admissions program, there are many factors that may entitle an applicant to a preference, thereby making the results of any one factor less predictable.

Plaintiffs also contend that the LSA's program, under which twenty points may be added to the selection index score of under-represented minority applicants, operates as the same type of "dual" or "two-track" system prohibited by Justice Powell in *Bakke*. (Pls.' 8/11/00 Br. at 15). The "two-track" system Justice Powell spoke of in *Bakke*, however, was not a two-track system that employed lower thresholds for minority applicants *vis a vis* majority applicants. Such a conclusion is evident from the fact that not once in his narrowly tailored analysis did Justice Powell ever discuss the fact that under the University of California's admissions program, majority students were subject to a 2.5 minimum GPA requirement, whereas there was no minimum GPA requirement for minority students. *See id.* 274-75, 98 S. Ct. at 2739-40.

Instead, the "two-track" system of which Justice Powell spoke was the university's system under which one group of students, *i.e.* minority students, competed for one set of seats, and another group of students, *i.e.* majority students, competed for another set of seats, thereby in

effect creating two separate admissions systems. Justice Powell's statement that the university's interest in genuine diversity would not be served by "expanding [the university's] two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants" further confirms that the two-track system Justice Powell spoke of related to the university's practice of setting seats aside for minority applicants, not the university's practice of employing different GPA requirements for minority *vis a vis* majority applicants. *Id.* at 314, 98 S. Ct. 2761.

Furthermore, unlike the University of California, the LSA does not utilize a separate admissions review committee for under-represented minority applications. Instead, admission counselors are assigned to specific geographic areas. Each counselor reviews all applications from his or her territory, under-represented minority and non-minority alike. There is no separate review or assignment of under-represented minority applicants as there was in *Bakke*. (Spencer Dep. at 273; Gauss Dep. at 31, Vanhecke Dep. at 99).

Moreover, whenever a point-based system such as the LSA's is used in making admissions decisions, any factor that may result in points being added to an applicant's total score will necessarily have the effect of lowering that applicant's admission threshold. For example, any time an applicant receives three points for an outstanding essay, it can just as easily be said that the threshold for admission for that applicant has now been reduced by three points. The same is true for each of the other factors used during the admissions process, *e.g.,* geographic location, alumni relationship, socioeconomic status, etc. Such a result is the natural byproduct of using such a point system.

What Plaintiffs really appear to contest is the fact that race is accorded twenty points, while other factors that may more consistently favor non-minority students are not typically accorded the same weight. However, as Justice Powell recognized in *Bakke,* universities may accord an applicant's race some weight in the admissions process and, in doing so, universities are not required to accord the same weight to race as they do other factors. *Bakke,* 438 U.S. at 317-18, 98 S. Ct. at 2762. As long as the admissions program does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a "plus" on account of their race.

Plaintiffs also attack the LSA's "flagging" system. According to Plaintiffs, the files of under-represented minorities remain "protected" insofar as the LSA's flagging procedure ensures that the files of such students remain in the "review pool" because of their race.

Under the LSA's current admissions system, a counselor *may* "flag" an applicant if (1) in the counselor's estimation, the applicant is academically prepared for the University, (2) has a selection index score of at least 80 for residents, or 75 for non-residents, and (3) possesses a quality or characteristic the LSA deems important to the composition of its incoming class, including under-represented minority status. Counselors, however, are not *required* to flag every under-represented minority applicant. Furthermore, applicants other than under-represented minority applicants may also be flagged. For example, other factors a counselor may consider in flagging applications include whether the applicant was in the top of his class, resided in a preferred county of Michigan, exhibited any "unique life experiences, challenges, circumstances,

interests or talents," exhibited a disadvantaged background, had an important connection to the University community, or was a recruited athlete. (Defs.' Exs., Ex. Z at 3-4). Given that any number of applicants, including applicants other than under-represented minority applicants, may be "flagged" under the LSA's current system, the Court rejects Plaintiffs' contention that under-represented minorities remain "protected" by virtue of such system.

Plaintiffs also contend that the University Defendants have failed to sustain their burden of showing that it considered race-neutral alternatives to its current program. For example, according to Plaintiffs, one obvious race-neutral mechanism would be to randomly select all or a portion of the class from the entire pool of 'qualified' applicants, regardless of race. Plaintiffs, however, fail to explain how randomly selecting all or a portion of the class from the entire pool of applicants would produce a sufficiently diverse student body. As discussed *supra,* to achieve the educational benefits associated with a racially and ethnically diverse student body, more than a token number of under-represented minority students is required. Given the small size of the applicant pool, it is highly unlikely that a random selection process would result in a sufficiently diverse student body.

Furthermore, the University Defendants have presented evidence that a race-neutral admission program would substantially reduce the number of under-represented minority students in the LSA's incoming student body. (*See* Raudenbush 2/24/00 Supp. Rep. at 4-5; Raudenbush 3/3/99 Supp. Rep. at 9-11). If race were not taken into account, the probability of acceptance for

minority applicants would be cut dramatically, while non-minority students would see only a very small positive effect on their probability of admission, due largely in part to the size of their respective applicant pools. (*See* Raudenbush 3/3/00 Supp. Rep. at 11).

The University Defendants have also presented evidence that a system that relied entirely on test scores would also lead to the rejection of a number of qualified minority applicants. (Bowen Rep. at 10). This is due to the fact that nationally, minorities are very under-represented at the higher level of standardized test scores, and over-represented at the lower level. (*Id.* at 10).

The University Defendants have also presented the expert opinion of William G. Bowen that the race-neutral admissions program currently used by the University of Texas, under which all students who finish in the top ten percent of their high school class are guaranteed admission, and any system based purely on an applicant's income level, would not be as effective in enrolling "an academically well prepared and diverse student body." (Bowen Rep. at 12). According to Bowen, the Texas approach would have the effect of "admit[ting] some students from weaker high schools while turning down better-prepared applicants who happen not to finish in the top tenth of their class in academically stronger schools." (*Id.*). Bowen further hypothesizes that "[s]o long as high schools differ so substantially in the academic abilities of their students and the level of difficulty of their courses, treating all applicants alike if they finished above a given high school class rank provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions." (*Id.*).

According to Bowen, income-based strategies are just as ineffective as there "are simply too few blacks and Latinos from poor families who have strong enough academic records to qualify for admission to highly selective institutions." (*Id.* at 13). Bowen also reports that if universities were totally eliminated from considering race during the admissions process, "over half of the black students in selective colleges today would have been rejected." (*Id.*).

Furthermore, the University has attempted to enlarge its pool of under-represented minority applicants through vigorous minority recruitment programs, which have all proved to be unavailing. For example, the University's efforts have included personal contact with minority students at symposia, attendance at recruiting fairs, direct mailings, campus visits, and offices in Detroit. (Vanhecke Dep. at 11-12; Spencer Dep. at 29, 196-97). Nevertheless, according to the University, its pool of qualified minority applicants for the LSA has remained small, most of whom are also highly recruited by other selective institutions and universities. (Defs.' 7/17/00 Br. at 27).

The Court also rejects Plaintiffs' contention that the LSA's current system amounts to nothing more than racial balancing. Unlike the cases relied upon by Plaintiffs, the LSA does not seek to achieve a certain proportion of minority students, let alone a proportion that represents the community. To that end, the Court agrees with the Fourth Circuit in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 687, 707 (4th Cir. 1999), that an educational institution's goal of achieving the educational benefits associated with a diverse student body "do[es] not require racial balancing." However, the University's interest does require a sufficiently diverse student body and therefore, requires

that some attention be given to the composition of the student body. Although fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is.

In summary, the Court is satisfied that the LSA's current admissions program, under which certain minority applicants receive a "plus" on account of their race but are not insulated from all competition with other applicants, meets the requirements set forth by Justice Powell in *Bakke* and is therefore constitutional. Accordingly, the University Defendants' motion for summary judgment shall be granted with respect to the LSA's current admissions program, and Plaintiffs' motion for injunctive relief shall be denied.

B. The LSA's Prior Programs (1995-1998)

Although the Court finds the LSA's current admissions program to be permissible under the principles set forth by Justice Powell in *Bakke*, the Court is similarly satisfied that the LSA's prior admissions programs, when examined in their entirety, represent an impermissible use of race. One of the most significant factors that transforms the permissible into the impermissible in this case is the LSA's prior practice of "protecting" or "reserving" seats for under-represented minority applicants. As explained by the LSA itself:

> Because the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for in-state students and for certain other

> groups of students, including, for example, athletes, foreign applicants, *underrepresented minority candidates,* and ROTC candidates (sometimes referred to as "protected" space). This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it used to admit students from the postponed pool or the extended waiting list, applicants to other units, etc.

(Defs.' Answer Interrog. No. 1) (emphasis added); (*See also* Pls.' 4/9/99 Exs., Vol. 1, Exs. P, Q, & R) (showing number of protected seats for particular academic years). The LSA has also explained this practice in the following manner:

> LSA admissions occur on a "rolling" basis: rather than waiting for one date in late winter to notify all applicants of the disposition of their applications, LSA admits applicants throughout the admissions season. Under such a process, offers of admissions must be carefully monitored and managed to ensure that sufficient spaces are reserved, or protected, for attractive applicants who apply later in the cycle. The number of protected spaces is determined by the expected pool size of various groups of applications. *As applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used.* If the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list.

(Pls.' 4/9/99 Br. at 7 n.4) (quoting Defendants' Motion for Reassignment or Designating Actions as Companion Cases in *Grutter v. Bollinger,* 97-CV-5928-DT).

Other memoranda refer to these "protected" seats as being "reserved" for particular groups of applicants. (*See* Pls.' 4/9/99 Exs., Vol. I, Ex. M). In fact, one memorandum specifically states that the number of "protected groups" for Fall 1997 would be decreased, thereby "opening up slots for non-protected applicants." (*Id.,* Ex. O). This evidence clearly indicates that these slots were not merely protected from the admissions process itself, but from competition by non-protected applicants. It is clear that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke.*

In this Court's opinion, there is no significant difference between the LSA's prior practice of "protecting" or "reserving" seats and the University of California's quota system. The fact that non-minority applicants may have had a chance at any "leftover" spots at the end of the admissions cycle does not change this conclusion. Under both systems, preferred minority applicants were insulated from competition from non-preferred applicants for a given number of seats. The fact that this number may have changed from year to year, or even during any one particular admissions cycle, does not change this fact. It can hardly be said that those non-preferred applicants who, by pure chance, may have had an opportunity to compete for one of the leftover seats, were allowed to compete on equal footing for every seat in the class.

Furthermore, it is undisputed that from 1995 through 1997, the LSA used facially different grids and action

codes based solely upon an applicant's race. Under these differing grids, a certain group of non-preferred applicants were automatically excluded from competing for a seat in the class without any type of individualized counselor review solely on account of their race,[18] whereas, preferred minority applicants were never automatically rejected, regardless of their grades and test scores. Rather, all minority applicants received some type of individualized counselor review. (McKinney Dep. at 41, Spencer Dep. at 105). This practice of "automatic exclusion" continued into the 1998 academic year despite the LSA's switch to the selection index system. (McKinney Dep. at 97-98, 150-52).

The Court agrees with the University Defendants' assertion that all who are ultimately admitted to the LSA are "qualified" academically, and neither Plaintiffs nor this Court seek to imply that those minorities who are admitted under the lower admissions standards are not academically qualified for admission. It cannot be seriously disputed, however, that the effect of the LSA's differing standards was to systematically exclude a certain group of non-minority applicants from participating in the admissions process based solely on account of their race.

For example, in 1995 and 1996, the LSA used two grids for instate applicants,[19] one for "non-minority" applicants and another for "minority" applicants. The non-minority grid indicated that an applicant with a GPA 2 of

[18] The Court notes that the LSA's practice of automatically rejecting applicants also ended with the 1999 academic year.

[19] The Court notes that another set of grids was used for out-of-state applicants, for a total of four grids.

3.2-3.3 and ACT of 18-20/SAT of 400-500 would be automatically rejected, whereas a minority applicant with the same grade/score would have most likely been admitted.[20]

In so doing, the LSA's policies foreclosed each of the automatically rejected applicants from further consideration for a seat simply because they were not of a favored race or ethnicity. These applicants were never accorded any further individualized review as envisioned by Justice Powell in *Bakke*. In this Court's opinion, the LSA's different treatment of preferred minority applicants *vis a vis* non-preferred applicants at this stage of the admissions process further adds to the infirmity of the LSA's prior programs.

Moreover, the only distinguishing factor between the grids used by the LSA during these years was the applicant's race. Therefore, to the extent admissions counselors used such grids in making admissions decisions, it is clear from the face of the grids themselves that in some cases, the *only* defining factor was race.

Although the LSA's use of facially different grids/action codes based upon an applicants' race, in and of itself, may not have been constitutionally impermissible, when combined with the other components previously discussed by the Court, *i.e.* the LSA's use of protected seats and the LSA's system of automatic rejection, the Court is convinced that the LSA's prior programs, when examined in their entirety, fall within the impermissible under the

[20] The minority grid also contained the option of delaying such a minority applicant "for senior year SAT's or ACT's."

principles enunciated by Justice Powell in *Bakke*. Accordingly, Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs employed from 1995 through 1998.

Qualified Immunity

Defendants Bollinger and Duderstadt, who have been sued in their individual capacities under 42 U.S.C. § 1983, have moved for summary judgment on grounds of qualified immunity. Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988).

In order to determine whether an official is entitled to qualified immunity, a court must first consider, "whether, based on the applicable law, a constitutional violation occurred." *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996) (citing *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589 (6th Cir. 1994)). As discussed *supra*, the Court is satisfied that although diversity is a sufficiently compelling interest to survive strict scrutiny, the LSA's prior admissions programs (1995-1998) were nonetheless impermissible under the principles enunciated by Justice Powell in *Bakke*. Therefore, the Court is satisfied that a constitutional violation has occurred.

Next, the Court must determine whether the constitutional violation involved "'clearly established constitutional rights of which a reasonable person would have known.'" *Id.* at 1158 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995)). "In determining whether a constitutional right is clearly established, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself." *Sheets v. Moore*, 97 F.3d 164, 166 (6th Cir. 1996) (citing *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)). Neither party disputes the fact that under the Fourteenth Amendment, every individual is entitled to equal protection of the laws. To date, however, there has been only one Supreme Court decision addressing the extent to which a university may take race into consideration during the admissions decision, *i.e.*, the Supreme Court's decision in *Bakke*. As is illustrated by the foregoing discussion, the binding effect of Justice Powell's opinion in *Bakke* has been the subject of much debate in recent years.

Furthermore, to defeat a claim of qualified immunity, Plaintiffs must show that Defendants "knew or reasonably should have known" that their actions were unconstitutional. *Harlow*, 457 U.S. at 816, 102 S. Ct. 2727; *see also Dickerson*, 101 F.3d at 1151 (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). "'[T]he unlawfulness must be apparent.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)).

In finding the University of California's admission program unconstitutional, Justice Powell relied exclusively upon the fact that the university employed a rigid quota. In light of the principles enunciated by Justice Powell in *Bakke*, the Court does not believe that it would

necessarily have been unreasonable for an official in Defendants' position to conclude that the LSA's admissions policies were constitutional. It is clear that the University did not employ the same type of rigid quota renounced by Justice Powell in *Bakke*. Moreover, the mere fact that this Court has disagreed with Defendants as to whether the LSA's programs were constitutional does not automatically defeat qualified immunity. As the Supreme Court has explained, "[t]he qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant,* 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991).

Applying the defense of qualified immunity in this case is, in this Court's opinion, consistent with the qualified immunity standard. Courts themselves have been struggling for well over two decades to fully understand what constitutes a properly devised admissions program under *Bakke*. This Court cannot say that a reasonable official in Defendants' position should have known that the LSA's prior admissions programs were unconstitutional. Accordingly, Defendants' motion for summary judgment based upon the doctrine of qualified immunity shall be granted.

Eleventh Amendment Immunity

The Board of Regents ("the Board") also seeks summary judgment with respect to Plaintiffs' Title VI claims on grounds of Eleventh Amendment Immunity. In general,

Eleventh Amendment immunity bars plaintiffs from bringing claims for damages against a state or its officials acting in their official capacities unless the state has waived its immunity, or Congress has exercised its power to override that immunity. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). With respect to Title VI, Congress has enacted a specific provision abrogating the states' Eleventh Amendment immunity. *See* 42 U.S.C. § 2000d-7(a)(1).[21]

In fact, the Board specifically recognizes that Congress has abrogated its Eleventh Amendment immunity with respect to claims under Title VI, and that by accepting federal funds, it has consented to being sued for damages in federal court. (Defs.' 5/3/99 Br. at 68). In support of its motion for summary judgment, however, the Board contends that the *scope* of that agreement does not encompass Plaintiffs' claims because the Board was not on "notice" that its conduct in this case would subject it to liability. (*Id.* at 68-69). According to the Board, its actions must violate "*clearly established* legal principles" for its Eleventh Amendment immunity to be abrogated. (*Id.*) (emphasis in original).

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[21] 42 U.S.C. § 2000d-7(a)(1) specifically provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

None of the cases relied upon by the Board, however, support its claim that its Eleventh Amendment immunity cannot be abrogated unless it had notice that its conduct was unconstitutional. In *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action for sexual harassment against a school under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, based upon a theory of *respondeat superior* or constructive notice. Because the express remedial scheme of Title IX was based upon notice to an appropriate person and an opportunity to rectify the discriminatory behavior, the Supreme Court held that a plaintiff could not maintain a cause of action under Title IX based upon a theory of *respondeat superior* or constructive notice. *Id.* 524 U.S. at 290-93, 118 S. Ct. at 1999-2000.

Similarly, in *Guardians Association v. Civil Service Commission of City of N.Y.,* 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action under Title VI without showing intentional discrimination on behalf of the defendant. In *Guardians,* the Supreme Court ultimately held that intent was not an essential element of a Title VI violation, but "a plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI." *Id.* at 607, 103 S. Ct. at 3235. Each of these cases addressed the requisite showing a plaintiff must make to sustain a claim under the respective federal statute, not whether a state's Eleventh Amendment immunity could be abrogated where the state has not been put on "notice" that the specific conduct alleged to be a violation of federal law was illegal.

The Supreme Court has referred to § 2000d as an "unequivocal waiver" of the states' Eleventh Amendment immunity. *See Lane v. Pena,* 518 U.S. 187, 198, 116 S. Ct. 2092, 2099, 135 L. Ed. 2d 486 (1996). Furthermore, a number of courts have recognized that with respect to Title VI, Congress has validly abrogated the states' Eleventh Amendment immunity. *See, e.g., Fuller v. Rayburn,* 161 F.3d 516, 518 (8th Cir. 1998) ("We nevertheless agree with Mr. Fuller that by enacting section 2000d-7, 'Congress abrogated the States' Eleventh Amendment immunity under . . . Title VI.'"); *DeKalb County Sch. Dist. v. Schrenko,* 109 F.3d 680, 688 (11th Cir. 1997) ("On the other hand, the parties agree that Congress has abolished the states' immunity for causes of action grounded in Title VI."); *United States v. Yonkers Bd. of Educ.,* 893 F.2d 498, 503 (2d Cir. 1990) ("With respect to Title VI, which prohibits, inter alia, racial discrimination in federally assisted programs, Congress has expressly abrogated the states' Eleventh Amendment immunity. . . . ").

Moreover, to the extent that the Board seeks to extend the doctrine of qualified immunity to cover its actions, the Board's arguments must be rejected, as "[q]ualified immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity." *Johnson v. Outboard Marine Corp.,* 172 F.2d 531, 535 (8th Cir. 1999); *see also Rodriguez v. City of New York,* 72 F.3d 1051, 1065 (2d Cir. 1995) ("[T]he defense of qualified immunity protects only individual defendants sued in their individual capacity, not governmental entities."); *Hill v. Dekalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1185 (11th Cir. 1994) ("Governmental entities are not entitled to qualified immunity regarding section 1983 claims.").

By enacting § 2000d, Congress validly abrogated the states' Eleventh Amendment immunity with respect to Title VI claim. Therefore, although the Board remains free to assert that Plaintiffs have failed to set forth a proper case under Title VI, the Eleventh Amendment does not bar Plaintiffs' claims for damages. Accordingly, the Board's motion for summary judgment with respect to Plaintiffs' Title VI claim shall be denied.

Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment is granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years are declared unconstitutional. However, the University Defendants' motion for summary judgment is granted with respect to the LSA's admissions programs for 1999 and 2000. Furthermore, Plaintiffs' request for injunctive relief is denied. Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity is granted. The Board of Regent's motion for summary judgment on grounds of Eleventh Amendment immunity, however, is denied.

An Order consistent with this Opinion shall issue.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: December 13, 2000

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

ORDER

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

/

ORDER

(Filed Jan. 30, 2001)

At a session of said Court,
held in the U.S. District Courthouse,
City of Detroit, County of Wayne,
State of Michigan on JAN 30 2001

HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

For the reasons set forth in an Opinion issued December 13, 2000,

IT IS ORDERED that summary judgment is **GRANTED** in favor of Plaintiffs with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years are hereby declared unconstitutional;

IT IS FURTHER ORDERED that summary judgment is **GRANTED** in favor of the University Defendants with respect to the LSA's admissions programs for 1999 and 2000;

IT IS FURTHER ORDERED that Plaintiffs' request for injunctive relief is **DENIED**;

IT IS FURTHER ORDERED that Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity is **GRANTED**; and

IT IS FURTHER ORDERED that the Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity is **DENIED**.

In the opinion of this Court, this Order involves the following controlling questions of law, as to which there is substantial ground for difference of opinion: (1) whether a public university has a compelling interest in achieving the educational benefits of a diverse student body that will justify the consideration of race as a factor in admissions; and (2) if so, whether the admissions systems employed by the University of Michigan College of Literature, Science and the Arts from 1995 until 2000 are properly designed to achieve that interest.

In the opinion of this Court, an immediate appeal from the Order would materially advance the ultimate termination of the litigation.

Dated: January 30, 2001

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT
JUDGE

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

ORDER

(Filed Feb. 9, 2001)

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 09, 2001

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On December 13, 2000, this Court issued an Opinion granting Defendants Duderstadt and Bollinger's Motion for Summary Judgment on the grounds of qualified immunity and on January 30, 2001, this Court entered an Order granting Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity. Now therefore,

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby directs entry of final judgment on Plaintiffs' claims against the individual Defendants Duderstadt and Bollinger in their individual capacities. The clerk will enter final judgment dismissing those claims.

This Court finds that there is no just reason for delay in entering final judgment in favor of the individual Defendants. First, the parties have indicated their desire

to appeal other issues, and this Court previously has certified several issues for appeal pursuant to 28 U.S.C. § 1292(b). Second, claims under qualified immunity should be resolved as quickly as possible.

IT IS SO ORDERED.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

JUDGMENT

(Filed Feb. 9, 2001)

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

/

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 09 2001

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On January 30, 2001, this Court entered an Order granting Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity. Now therefore, in accordance with such Order

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' claim against individual Defendants Duderstadt and Bollinger in their individual capacities, is **DISMISSED.**

IT IS SO ORDERED.

Dated: _____

DAVID WEAVER
CLERK OF THE COURT

BY: /s/ [Illegible]
DEPUTY CLERK

APPROVED:

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWANBROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

OPINION

(Filed Feb. 26, 2001)

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing only the University Defendants' arguments that the LSA's admissions programs pass constitutional muster as a narrowly tailored means of achieving diversity, *see Gratz v. Bollinger,* 122 F.Supp.2d 811 (E.D. Mich. 2000), reserving Defendant-Intervenors' argument that the LSA's admissions programs pass constitutional muster as narrowly tailored means of remedying past and current discrimination by

the University for later consideration. This Opinion shall address the Defendant-Intervenors' arguments.

Discussion

As explained in the Court's prior Opinion in this matter, racial classifications are subject to the strictest of scrutiny, under which "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995). In opposition to Plaintiffs' motion for summary judgment, Defendant-Intervenors contend that the LSA's admissions programs "serve[] the uncontroverted compelling interest in remedying LS & A's past and current discrimination against minorities." (Def.-Intervenors' Resp. Pls.' Renewed Mot. Summ. J. at 2-3). In particular, Defendant-Intervenors contend that the University's race-conscious admissions policies serve to "remedy the present effects of discrimination that it has caused or tolerated; remedy the negative racial climate that it has sustained or that has been caused by others on the campus; and, remedy or off-set the effects of any current discrimination in which it is engaged." (*Id.* at 5).

In a proper case, racial classifications may be justified by a State's interest in remedying the effects of past or present "identified" discrimination. *Shaw v. Hunt,* 517 U.S. 899, 909, 116 S. Ct. 1894, 1902, 135 L. Ed. 2d 207 (1996) (citing *Croson,* 488 U.S. at 498-506, 109 S. Ct. at 724-28). To rise to the level of "compelling," however, such

an interest must meet two conditions. "First, the discrimination must be 'identified discrimination.'"[1] *Id.* (citing *Croson,* 488 U.S. at 499, 500, 505, 507, 509, 109 S. Ct. at 724-25, 725, 728, 729, 730). While states and their subdivisions may take remedial action when they possess evidence of past or present discrimination, "'they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.'" *Id.* (quoting *Croson,* 488 U.S. at 504, 109 S. Ct. at 727). "Second, the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'" *Id.* at 910, 116 S. Ct. at 1903 (quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277, 106 S. Ct. 1842, 1848, 90 L. Ed. 2d 260 (1986) (plurality opinion) (emphasis added)).

"A generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance for a legislative body to determine

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[1] Defendant-Intervenors assert that "courts have been more tolerant of race-conscious action taken to remedy race-based denial of educational opportunity" and have stated that "race-conscious steps to ensure equal educational opportunity for minorities may be constitutionally permitted *even in the absence of particular identified discrimination.*" (Def.-Intervenors' Resp. Pls.' Mot. at 4-5) (emphasis added). Each of the cases cited by Defendant-Intervenors, however, involved voluntary desegregation plans designed to eliminate the vestiges of past *de jure* or *de facto* segregation in the educational context. Defendant-Intervenors have provided no evidence that the State of Michigan ever maintained a segregated higher education system, or that the admissions policies at issue were designed as voluntary plans to integrate its higher education system. Therefore, the Court is satisfied that Defendant-Intervenors must present evidence of particular identified discrimination.

the precise scope of the injury it seeks to remedy.'" *Id.* at 909, 116 S. Ct. at 1902-03 (quoting *Croson,* 488 U.S. at 498, 109 S. Ct. at 724 (O'Connor, J.)). For this reason, the Supreme Court has repeatedly stated that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-10, 116 S. Ct. at 1903 (citing *Wygant,* 476 U.S. at 274-75, 276, 288, 106 S. Ct. at 1847-48, 1854).

When the race-based classifications of an affirmative action plan are challenged, "the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the . . . identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination." *Contractors Ass'n of E. Pa. v. Philadelphia,* 91 F.3d 586, 597 (3d Cir. 1996); *see also Concrete Works of Colo. v. Denver,* 36 F.3d 1513, 1521-23 (10th Cir. 1994). Once this burden of production has been met, "the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not 'fit' the identified discrimination." *Id.* Ultimately, the plaintiffs challenging the program retain the burden of persuading the court that a violation of the Equal Protection Clause has occurred by either persuading the court that the race-based preferences were not intended to serve the asserted compelling interest, or that there is no strong basis in the evidence as a whole to support the defendant's conclusion that the identified discrimination actually existed, or that the continuing effects of such discrimination necessitated the chosen remedy. *Id.*

The significance of the burden of persuasion differs depending upon which path the plaintiff chooses to pursue. If the plaintiff's theory is that the race-based preferences were adopted with an intent unrelated to remedying past discrimination, "the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else." *Id.* "The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important." *Id.* at 597-98.

When the plaintiff proceeds under the theory that, "although the [defendant] may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence," the plaintiff bears the burden of persuading the court that the facts alleged as support for the defendant's conclusions are not accurate. *Id.* at 598. Under this approach, "[t]he ultimate issue as to whether a strong basis in evidence exists is an issue of law" and, therefore, "[t]he burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue." *Id.*

Defendant-Intervenors assert that the University's race-conscious admissions policies serve to "(1) remedy the present effects of practices of LS & A that have served to exclude African Americans and Latinos from enrollment, (2) provide a critical mass of students to remedy LS & A's hostile racial climate, and (3) remedy the discriminatory effects of LS & A's current admissions criterion." (Def.-Intervenors' Resp. Pls.' Renewed Mot. Summ. J. at 7).

1. The "Actual" Purpose Behind the LSA's Race-Conscious Admissions Programs

Plaintiffs initially assert that the Court should reject Defendant-Intervenors' arguments because it is clear from the University Defendants' extensive briefing on this issue that the "actual purpose" behind the University's race-conscious admissions policies was not to remedy past or present discrimination, but rather, to achieve "diversity." (Pls.' 8/24/00 Br. at 2-7). According to Plaintiffs, "neither the University nor the intervenors even pretend that the University was actually motivated by the interests that intervernors ask this Court to consider. The remedial justifications are just rationales that the intervenors believe the University *might have* chosen to adopt to justify their discriminatory admissions policies." (*Id.* at 5) (emphasis in original).

The Supreme Court has cautioned that when engaging in an Equal Protection analysis, the Court must look behind a defendant's "articulated" reason to determine whether there is sufficient evidence to conclude that the "articulated" reason is genuine, *i.e.*, that the articulated reason actually motivated the race-conscious program or policy. *See, e.g., Shaw,* 517 U.S. at 910, 116 S. Ct. at 1902; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728, 102 S. Ct. 3331, 3338, 73 L. Ed. 2d 1090 (1982). When conducting such an inquiry, the Court does not look behind the "articulated" interest to decipher for itself whether there were other justifiable reasons that may have supported the race-conscious program. "[A] racial classification cannot withstand strict scrutiny based upon what 'may have motivated the [State].'" *Shaw,* 517 U.S. at 908 n.4, 116 S. Ct. at 1902 n.4. The state actor must show that

the alleged objective was the "actual purpose" for the discriminatory classification. *Id.*

In allowing Defendant-Intervenors to join this action, the Sixth Circuit found it persuasive "that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Grutter v. Bollinger,* 188 F.3d 394, 398 (6th Cir. 1999). The Court shall interpret the Sixth Circuit's statement as an indication that although the University Defendants have never claimed that the LSA's race-conscious admissions programs were implemented to remedy past or present discrimination, Defendant-Intervenors should be given the opportunity to present evidence that remedying discrimination was the "actual" purpose behind the LSA's admissions programs.

According to Defendant-Intervenors, "[d]espite the University's sole reliance on *Bakke's* diversity rationale in this litigation, the record quite clearly shows that the University was motivated by both diversity and remedial purposes in adopting its affirmative action program." (Def.-Intervenors' 9/1/00 Sur-Reply at 5). It is not enough, however, that remedial measures "may have" motivated the LSA in adopting the challenged admissions programs. As part of their burden, Defendant-Intervenors must establish that remedial measures "actually" motived the challenged race-conscious programs. *See Shaw,* 517 U.S. at 908 n.4, 116 S. Ct. at 1902 n.4.

In this Court's opinion, Defendant-Intervenors have failed to present any evidence that the discrimination

alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs. Although not dispositive, the University Defendants have never claimed that the challenged programs were implemented as a means to remedy past discrimination. *See Hogan,* 458 U.S. at 727 n.16, 102 S. Ct. at 3339 n.16 (stating that even if court were to assume discrimination had occurred, challenged policy would nonetheless be invalid because the state failed to establish that the legislature "intended" the challenged policy to compensate for any perceived discrimination); *Lutheran Church-Mo. Synod v. F.C.C.,* 141 F.3d 344, 354 (D.C.Cir. 1998) (rejecting interest asserted by Department of Justice in support of F.C.C. administrative regulation because "[a]s the independent agency which promulgated the regulation in question, [the F.C.C.'s] view of the government interest it was pursuing must be accepted").

Furthermore, the terms of the admissions policies themselves indicate that they were developed to achieve diversity, not as a means to remedy discrimination. For example, the 1997 guidelines refer to "students who meet the spirit of contributing to a *diverse class.*" (Pls.' 4/9/99 Exs., Ex. AA at ¶ F.1) (emphasis added). The 1998, 1999, and 2000 admissions guidelines state that "[a]dmission is based on several factors that combine to produce a freshman class that provides *a mixture of attributes and characteristics* valued by the University," and that it is the University's "sincere belief that this *mixture* contributes to the education of our students, as well as fulfills the University's mission to prepare society's future citizens and leaders." (Pls.' 4/9/99 Exs., Ex. DD at ¶ I.B.4 & Ex. EE at 1 (1998); Kolbo Aff., Ex. A at ¶ I.B.4 & Ex. B at 1 (1999); Ex.

C at ¶ I.B.4 & Ex. D at 2 (2000) (emphasis added)). The guidelines also state that the University was "committed to an educational experience that involves students interacting with other students of different races and ethnicities than their own." (Pls.' 4/9/99 Exs., Ex. EE at 7 (1998); Kolbo Aff., Ex. A at ¶ I.B.4 & Ex. B at 1 (1999); Ex. C at ¶ I.B.4 & Ex. D at 2 (2000)).

Moreover, Defendant-Intervenors acknowledge that the admissions policies at issue were a result of the Michigan Mandate. (Def.-Intervenors' 9/1/00 Sur-Reply at 7). President Duderstadt has "described the Michigan Mandate as an attempt to better respond to the diversity of the nation and the world, by trying to change the nature of the institution itself so that all ethnic groups could be brought fully into the life and leadership of the institution," and enacted "with the goal of building a multicultural learning community which values, respects, and draws intellectual strength from the rich diversity of people of different races." (Pls.' 6/1/99 Exs., Exs. H & I). In a series of letters written in 1995, President Duderstadt explained the Michigan Mandate as the University's "commitment to make the University of Michigan a national and world academic leader in the *racial and ethnic diversity* of its faculty, students, and staff," and repeatedly referred to the University's efforts to "achieve diversity," "better reflect ethnic, racial, and socioeconomic diversity," and "to build a richly diverse community of students." (Pls.' 6/1/99 Exs., Exs. D, E, & F) (emphasis added).

The fact that none of the evidence cited by Defendant-Intervenors even discusses past or present discriminatory conduct toward Native Americans is further evidence that the University's race-conscious admissions policies were not designed with a remedial purpose in mind. *See Croson,*

488 U.S. at 506, 109 S. Ct. at 728 (stating that the "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination . . . suggests that perhaps the city's purpose was not in fact to remedy past discrimination"). The justifications for a suspect policy or program must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia,* 518 U.S. at 533, 116 S. Ct. at 2275.

"[A] tenable justification must describe actual state purposes, not rationalizations for actions differently taken." *Id.* at 535, 116 S. Ct. at 2277. Defendant-Intervenors have presented no evidence that the LSA's race-conscious admissions programs were enacted to counter the present effects of past discriminatory policies or the discriminatory impact of the other SCUGA factors. To the contrary, all of the evidence supports the conclusion that the University's race-conscious admissions programs were specifically designed for the purpose advanced by the University Defendants, *i.e.* racial and ethnic diversity. Therefore, even if the Court were to assume that the alleged discrimination or continuing effects thereof exists today, Defendant-Intervenors' argument would nonetheless fail as there is no evidence that the LSA's race-conscious admissions programs were actually put in place to remedy such discrimination. *See Hogan,* 458 U.S. at 727 n.16, 102 S. Ct. at 3339 n.16.

2. The University's History of Discrimination

Conversely, even if Defendant-Intervenors had presented evidence that the LSA's race-conscious admissions programs were actually implemented in an effort to

remedy past or current discrimination, Defendant-Intervenors' argument would nonetheless fail because Defendant-Intervenors have failed to establish a genuine issue of fact as to whether the identified discrimination in fact exists or existed, as well as whether the race-conscious admissions policies are necessary to remedy such discrimination. Defendant-Intervenors assert that the LSA's consideration of race in admissions decisions "serves compelling interests in remedying the continuing effects of long-standing discrimination at the University." (*Id.* at 6). According to Defendant-Intervenors, "Professor James Anderson's expert report and other evidence in the record establish that since its founding, the University has engaged in racially discriminatory and exclusionary practices against minorities." (*Id.* at 7). Specifically, Defendant-Intervenors contend that:

> The record shows that the University tolerated the presence of a few minorities, but that it refused to integrate them meaningfully into campus life, establishing racially segregated housing, maintaining segregated fraternities and sororities, and – when the University finally permitted African-American students to live on campus in dormitories – acquiescing to white students who refused to room with them. Through the years and to the present, minority students have struggled to maintain their presence on campus, enduring racial incidents on campus and in classrooms, from other students, faculty and staff. The University, even after receiving these complaints and corroborating student experiences, either refused to act, or did so in a woefully inadequate manner.

(*Id.* at 7).

In his expert report, Professor James Anderson, Head of the Department of Educational Policy Studies and Professor of History at the University, recounts the history of the University from 1817 to the present. According to Professor Anderson, although the University was founded in 1817, it was not until 1868 that the first African American students were enrolled, and up until 1930, African Americans were systematically excluded from University-owned housing. (Anderson Rep. at 3-10). On-campus housing remained segregated up until the 1960s.

Moreover, despite the fact the Michigan Civil Rights Congress had called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations in 1949, and in 1952 the Committee on Student Affairs accepted a proposal to eliminate discriminatory clauses in fraternity and sorority by-laws, then University President Harlan Hatcher rejected such proposals and allowed student organizations to continue to prohibit membership based on race, religion, or color. (*Id.* at 5). According to one observer, as of 1959, no fraternity had ever accepted an African American student. (*Id.* at 11). Through the late 1950's, the University refused to integrate its housing by continuing its policy of respecting students' wishes who did not wish to live with a student of another race. (*Id.* at 7).

In 1966, the Defense Department conducted an investigation of the University's compliance with Title VI of the Civil Rights Act of 1964, ultimately urging the University to increase its enrollment of African American students, faculty, and staff. (*Id.* at 9). In 1967, the University's first black professor, Professor Albert Wheeler, wrote a letter to then Vice Presidents Allan Smith and Frank Pierpont expressing his fear that the University had

developed an "unfavorable image" among the African American community. (*Id.* at 15). During her deposition, a 1971 graduate of the LSA recounts how University staff actively discouraged her from applying to the LSA, and that one admissions counselor specifically told her that "community college might be better suited for [her]." (Glenn Dep. at 10).

During the 1970s, minority students often voiced their concern regarding the University's failure to address campus racism and to increase minority enrollment. (Anderson Rep. at 17-19). According to Defendant-Intervenors, throughout the 1970s and 1980s, the University "continued to tolerate racial tensions on campus that had a devastating effect on minority enrollment, and minority participation and sense of belonging on campus." (Def.-Intervenors' Br. Resp. Pls.' Mot. Summ. J. at 13; Anderson Rep. at 32-34). Racial tension in the dorms became widely publicized in the early 1970s. (Anderson Rep. at 35). "Both University officials and students acknowledge[d] the severity of racial tensions within the dormitory system, and the inadequacy of any attempt to improve them." (*Id.*).

A 1980 study of African American students at the University revealed that eighty-five percent of the students surveyed had encountered racial discrimination while at the University, ninety percent wanted more African American students at the University, and over sixty percent stated they had little or no contact with African American faculty and staff. (*Id.* at 52). Expert Dr. Joe R. Feagin, Ph.D., a graduate research professor in sociology at the University of Florida, also reports that a 1980 survey of more than two hundred black undergraduates at the University of Michigan revealed that "most had faced verbal and other racial harassment since arrival" at

the University, mostly comprised of "total avoidance by white students and subtle actions or statements with racist overtones." (Feagin Rep. at 9). Between 1976 and 1985, the University suffered a drastic decline in minority enrollment, losing 34 percent of its African American students. Niara Sudakasa, Report on Minorities, Handicappers and Women in Michigan's Colleges and Universities at 10 (1986).

From 1986 to 1987, a number of racist events occurred at the University, including the distribution of racist fliers, vandalism in the minority lounge, and racist jokes broadcast over the University's campus radio station. (Anderson Rep. at 62; Ransby Dep. at 19-21, 33-34). An investigation resulted in a report recognizing that African American students at the University were "likely to be subjected to ridicule, abuse, and threat," as well as "instructors who make openly racist comments, inside and outside of class," and that the radio broadcasts were "only a symptom of a pervasive atmosphere on this campus." (Anderson Rep. at 63-64).

In 1995, students continued to voice concerns regarding racism on the University's campus, citing incidents in which racist messages were scrawled on walls and sent via e-mail. (Anderson Rep. at 74-75). Professor Anderson, however, also reports that "[g]eneral perceptions of racial climate on campus among students of color have become more positive," and that a 1994 study revealed that "students of color in general do not perceive tremendous tension, nor do White students feel overwhelmed by hostility from students of color." (*Id.* at 76-77). According to Professor Anderson, "perceptions of racial climate, particularly in the residence halls, are significantly more positive in the post Michigan Mandate era." (*Id.* at 77).

Dr. Feagin also reports of "several dozen complaints by black students and staff at the University" describing racist incidents from 1990 through 1999, including racist graffiti, racially derogatory remarks, white supremacist group lettering, racist slurs by whites on or near campus, racist e-mail messages, and racist literature. (Feagin Rep. at 9-10). Dr. Feagin attributes the University's racially hostile environment to white students (*Id.* at 14-18), white professors' perceived attitudes toward minority students (*Id.* at 21-23), negative experiences with campus security personnel (*Id.* at 24-26) (*see also* Def.-Intervenors' 8/11/00 Exs., Vol. IV, Ex. 7), and negative experiences with other white staff members (*Id.* at 27-28).

It is also Dr. Walter Allen's expert opinion that "African American and Latino/Hispanic students regularly experience racial incidents on the [University's] campus" and "describe a hostile racial environment." (Allen Rep. at 13). According to Dr. Allen, African American and Latino students report being the subject of racial stereotypes in the classroom and that "white faculty and white students avoid interacting with them outside of class." (*Id* . at 14). Defendant-Intervenors have also presented portions of deposition testimony from several past and present minority students, who have each recounted incidents in which they have experienced racial hostility or stereotyping by other students or faculty members. (Def.-Intervenors' 8/11/00 Exs., Vol. IV, Exs. 1-6).

3. Present Effects of the University's Prior Discrimination

As an initial matter, the Court notes that Defendant-Intervenors have presented the Court with no evidence that the University or the LSA ever facially discriminated

against minorities in admissions decisions. There is absolutely no evidence that minorities were ever outright excluded from admission to the University; nor is there any evidence that the University's past admissions programs had a discriminatory impact on minority applicants.

Furthermore, with the exception of racial hostility, which Defendant-Intervenors have presented evidence of well into the 1990s, all of the University's allegedly discriminatory conduct cited by the Defendant-Intervenors, *i.e.* segregated housing, segregated fraternities, and policies allowing non-minority students to refuse to room with minority students, occurred years before the challenged admissions policies were put in place. Where the identified discrimination has occurred in other than the immediate past, "the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination." *Podberesky v. Kirwan,* 956 F.2d 52, 56 (4th Cir. 1992), *vacated on other grounds,* 38 F.3d 147 (4th Cir. 1994); *Wygant,* 476 U.S. at 280, 106 S. Ct. at 1850; *Fullilove v. Klutznick,* 448 U.S. 448, 480, 100 S. Ct. 2758, 2775, 65 L. Ed. 2d 902 (1980) ("We recognize the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal."). According to Defendant-Intervenors, "[t]he continuing effects of the discrimination against minority students is evident in the fact that students of color, understandably concerned with the school's reputation for discrimination and racial insensitivity, *may* be deterred from applying." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 17) (emphasis added).

As evidence that the University's prior discriminatory policies have continually deterred African Americans from attending the University, Defendant-Intervenors cite the fact that as the percentage of African Americans graduating high school in Michigan rose from 8.9% in 1976 to 10.97% in 1983, the percentage of African Americans enrolled at the LSA decreased from 7.2% to 5.14%. (*Id.* at 18).

As the Supreme Court has recognized, reliance on statistical disparities to establish a *prima facie* pattern or practice of discriminatory conduct is not appropriate where special qualifications are required. *See Croson,* 488 U.S. at 501, 109 S. Ct. at 726 ("But it is equally clear that when special qualifications are required to fill a particular job, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.") (internal quotation omitted). "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501-02, 109 S. Ct. at 726. Defendant-Intervenors have presented no evidence regarding the number of African Americans graduating high school in 1976 or 1983 that were qualified to attend the University, nor, more importantly, the number of high school graduates even interested in attending college.

Furthermore, the Court finds Defendant-Intervenors' statistical data from 1976 and 1983 to be of little probative value with respect to whether such policies served to deter African American and other minority students from applying to the University in 1995 when the first of the challenged admissions programs was implemented. As

Defendant-Intervenors themselves acknowledge, "[t]he years after the passage of the Civil Rights Act of 1964 saw a marked increase in the number of African American students attending the University." (*Id.* at 10). Although there were only approximately thirty-five African Americans enrolled at the University in 1935, in 1966, African American students constituted 1.2 percent of the University's 32,000 student population, 3.5 percent in 1970, 6.8 percent in 1972, and 7.1 percent in 1990. The fact that the percentage of minority students attending the University has steadily increased tends, in this Court's opinion, to indicate that any deterrent effect the University's prior discriminatory policies and practices may have had has dwindled in recent times.

Defendant-Intervenors also assert that "[t]he parents of the children who present themselves for admissions to Michigan today, did not have the economic and social advantage gained from attending an institution such as Michigan, and thus cannot pass on the full range [of] advantages to their children that many white parents, who are more likely to have attended Michigan, can." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 18). Defendant-Intervenors, however, have provided no link between any particular identified discrimination on behalf of the University and the social or economic disadvantage of such parents. As previously discussed, generalized assertions of past discrimination in a particular spectrum, such as college admissions, or of societal discrimination, do not provide a strong basis for engaging in remedial action. *See Shaw,* 517 U.S. at 909-10, 116 S. Ct. at 1902-03.

Although Defendant-Intervenors frame their argument in terms of remedying the continuing effects of the

University's prior discrimination, it is clear from the evidence cited by Defendant-Intervenors that the alleged deterrence stems from the past and current racial hostility on campus and/or the University's alleged acquiescence in such hostility, not from any "identified" discrimination by the University itself. Accordingly, the Court rejects Defendant-Intervenors' contention that the University has a compelling interest in remedying any present effects of its own past discrimination.

4. The University's Past and Current Hostile Racial Climate

Defendant-Intervenors have presented ample evidence that minority students at the University have been, and continue to be subjected to, racial hostility, stereotyping, and isolation. According to Defendant-Intervenors, "[t]his hostile environment is perpetuated by various aspects of the University community, including other students, University staff, and professors." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 19). As Defendant-Intervenors explain, "[b]y increasing the numbers of African-Americans and Latinos, race-conscious admissions provides the critical mass of minority students required to remedy this negative social climate and the detrimental isolation that they experience." (*Id.*).

According to Defendant-Intervenors' experts, studies show that race-conscious admissions programs serve to remedy this negative racial climate by creating a "critical mass" of African American and Latino students on campus such that African American and Latino students are "able to form the necessary community and social support networks associated with success." (*Id.* at 23-24; Allen Rep. at 7). Defendant-Intervenors further assert that

"[t]his increase in numbers serves to reduce the racial isolation that is so harmful to the educational experiences of minority students, increase intergroup interaction, and thus help diminish negative racial stereotypes and racial hostility." (*Id.* at 24).

As Defendant-Intervenors correctly acknowledge, although the University itself is not the cause of the alleged racial hostility, it may take affirmative steps to dismantle a system of racial exclusion in which it has become a passive participant. *Croson,* 488 U.S. at 492, 109 S. Ct. at 720. Defendant-Intervenors, however, have provided no evidence that the University has been a "passive participant" in the more recent racial episodes outlined above. As the Supreme Court has acknowledged, there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for African Americans. This observation, however, by itself, is not sufficient to justify race-conscious measures. *Id.* at 499, 109 S. Ct. at 724.

5. Discriminatory Effect of the University's Current Admissions Policies

Next, Defendant-Intervenors assert that the University's race-conscious admissions policies are necessary to counteract other factors in its admissions policies that have an adverse impact on minority applicants. (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 26-32). Defendant-Intervenors have presented the expert reports of William T. Trent, and Drs. Jacob Silver and James Rudolph, in support of their assertion that other factors considered in the University's admissions policies have an adverse impact on minority applicants, specifically African Americans and Latino Americans.

According to Defendant-Intervenors, the SCUGA factors "are used to enhance the GPAs or selection index point totals of white applicants to a significantly greater degree than for African-American and Latino applicants, rendering the latter less competitive in the admissions process." (*Id.* at 30; Trent Rep. at 7; Silver & Rudolph Rep. at 14-15). For example, African American and Latino applicants are less likely to attend high schools that receive a high "S" (school) factor, or offer advanced courses contributing to an applicant's "C" (curriculum) factor. (*Id.* at 27-28; Trent Rep. at 4-7). Similarly, due to the University's past history of discrimination, it is less likely that a minority student will receive any alumnus "A" (alumni) points. (*Id.* at 29; Trent Rep. at 7; Silver & Rudolph Rep. at 16-17). Furthermore, minority students are less likely to reside in the forty-five northern Michigan counties that the University identifies as under-represented under its "G" (geography) factor.[2] (*Id.* at 30; Trent Rep. at 7; Silver & Rudolph Rep. at 16).

In this Court's opinion, Defendant-Intervenors' reliance upon the discriminatory impact of the other SCUGA factors is misplaced as the SCUGA factors are but one component of the overall race-conscious admissions programs that Plaintiffs seek to invalidate. Because both the allegedly discriminatory SCUGA factors and the racial preferences are part of the same program, there is no overall discriminatory impact.

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[2] The "U" (unusual) factor includes under-represented minority status.

Moreover, if the current selection criteria have a discriminatory impact on minority applicants, it seems to this Court that the narrowly tailored remedy would be to remove or redistribute such criteria to accommodate for socially and economically disadvantaged applicants of all races and ethnicities, not to add another suspect criteria to the list. Accordingly, the Court finds Defendant-Intervenors' contention to be unpersuasive.

Conclusion

Defendant-Intervenors have failed to cite any evidence that the LSA's race-conscious admissions criteria were actually motivated by a desire to remedy any past or present discrimination by the University. Furthermore, the Court is satisfied that the LSA's race-conscious admissions programs cannot be justified as measures to remedy either the current effects of past discrimination, or the discriminatory impact of the LSA's other admissions criteria. Because Defendant-Intervenors have failed to present sufficient evidence to create a genuine issue of material fact in support of their claim that the LSA's admissions programs in existence from 1995 through 1998 were a narrowly tailored means of achieving the compelling governmental interest of remedying the present effects of past discrimination, Plaintiffs are entitled to summary judgment on this issue.[3]

[3] The Court notes that its decision today has no practical effect on its prior decision regarding the LSA's admissions programs in existence for 1999 and 2000, as such policies were previously found to be constitutional as a narrowly tailored means of achieving a compelling

(Continued on following page)

To survive summary judgment, the nonmoving party "is required to do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby,* 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). The Court is satisfied that Defendant-Intervenors have failed to sustain this burden. Therefore, Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination shall be granted, and Defendant-Intervenors' claims that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination shall be dismissed.

An Order consistent with this Opinion shall issue forthwith.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Date: Feb. 26, 2001

governmental interest, *i.e.* diversity. *See Gratz,* 122 F.Supp.2d at 827-31.

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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD LINDA A. HARRIS DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

ORDER

(Filed Feb. 26, 2001)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 26 2001.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing only the University Defendants' arguments that the LSA's admissions programs pass constitutional muster as a narrowly

tailored means of achieving diversity, *see Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), reserving Defendant-Intervenors' argument that the LSA's admissions programs pass constitutional muster as narrowly tailored means of remedying past and current discrimination by the University for later consideration. For the reasons stated in an Opinion issued this date,

IT IS ORDERED that Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination is **GRANTED**; and

IT IS FURTHER ORDERED that Defendant-Intervenors' claims that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination are **DISMISSED**.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: FEB 26 2001
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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs, v. LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN, Defendants, and EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.	CASE NO.: 97-CV-75231-DT HON. PATRICK J. DUGGAN **ORDER**

WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

ORDER

(Filed Mar. 21, 2001)

At a session of said Court, held in the
U.S. District Courthouse, City of Detroit,
County of Wayne, State of Michigan,
on _____.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing the University Defendants' arguments that the LSA's admissions policies constituted a narrowly tailored means of achieving the educational benefits of a diverse student body,

concluding, *inter alia,* that the LSA's admissions programs in existence from 1995 through 1998 were unconstitutional, but that the LSA's admission programs for 1999 and 2000 were constitutional. *See Gratz v. Bollinger,* 122 F. Supp. 2d 811 (E. D. Mich. 2000).

On January 30, 2001, the Court issued an Order reflecting the findings in its December 13, 2000 Opinion. In the same Order, the Court certified that the issues addressed in its December 13, 2000 Opinion and January 30, 2001 Order involved controlling questions of law, as to which substantial ground for difference of opinion existed, and that an immediate appeal from such Order would materially advance the termination of this litigation.

On February 26, 2001, this Court issued an Opinion and Order granting Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified issuing race as a factor in admissions to remedy the present effects of past discrimination. This matter is currently before the Court on Defendant-Intervenors' "Motion for Entry of Final Judgment Pursuant to 54(b), and in the alternative, 59(e) Motion to Add a Certification for Interlocutory Appeal."

Rule 54(b) of the Federal Rules of Civil Procedure provides that when multiple parties are involved, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Court is satisfied that there is no just reason for delay with respect to the Defendant-Intervenors' claims. The Court has fully adjudicated Defendant-Intervenors' claims. Furthermore, the Court

has already certified that an immediate appeal with respect to the University Defendants' claims regarding diversity would materially advance this litigation. In fact, both Plaintiffs and the University Defendants have already instituted appellate proceedings with respect to the Court's January 30, 2001 Order. In this Court's opinion, entering final judgment with respect to Defendant-Intervenors' claims would avoid the possibility of piecemeal appeals and provide for a more efficient utilization of judicial resources. Therefore, the Court finds that there is no just reason for delay and accordingly,

IT IS HEREBY ORDERED that final judgment is entered with respect to Defendant-Intervenors' claims.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: MAR 21 2001

Copies to:

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APPENDIX H

Nos. 01-1333/1416/1418/1438/1447/1516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ AND PATRICK HAMACHER FOR THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellants (01-1333 and 01-1418), Plaintiffs-Appellees (01-1416)

v.

LEE BOLLINGER, ET AL.,

Defendants-Appellees (01-1333 and 01-1418) Defendants-Appellants (01-1416),

EBONY PATTERSON, ET AL.,

Defendants-Appellees (01-1333) Intervening Defendants (01-1416) Intervening Defendants-Appellees (01-1418) Intervening Defendants-Appellants (01-1438)

BARBARA GRUTTER,

Plaintiff-Appellee (01-1447 and 01-1516),

ORDER

(Filed Oct. 19, 2001)

v.

LEE BOLLINGER, ET AL.,

Defendants-Appellants (01-1447),

and

KIMBERLY JAMES, ET AL.,

Intervening Defendants-Appellants (01-1516).

BEFORE: MARTIN, Chief Circuit Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

The plaintiffs in these consolidated appeals filed a petition seeking initial *en banc* review of the decisions of the two district courts before whom the cases were heard. The petition was referred to the three-judge panel to which the appeals had been assigned for oral argument on October 23, 2001.

The panel requested that all of the active judges of the court be polled to determine whether or not the petition should be granted and the appeals be presented in the first instance to the *en banc* court for argument and decision. A majority of the active judges voted to grant the petition; therefore

IT IS ORDERED that the petition for initial hearing *en banc* be, and it hereby is, GRANTED. It is FURTHER ORDERED the oral argument scheduled for October 23, 2001 is cancelled; oral argument to the *en banc* court

will be on Thursday, December 6, 2001, at 1:30 P.M., EST, in Cincinnati, Ohio.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX I

Nos. 01-1333/1416/1418/1438/1447/1516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs-Appellants
(Nos. 01-1333 and 01-1418)
Plaintiffs-Appellees
(No. 01-1416)

v.

LEE BOLLINGER, et al.,

Defendants-Appellees
(Nos. 01-1333 and 01-1418)
Defendants-Appellants
(No. 01-1416)

EBONY PATTERSON, et al.

Defendant-Appellees
(No. 01-1333)
Intervening Defendants
(No. 01-1416)
Intervening Defendants-Appellees
(No. 01-1418)
Intervening Defendants-Appellants
(No. 01-1438)

BARBARA GRUTTER,
Plaintiff-Appellee
(Nos. 01-1447 and 01-1516)

LEE BOLLINGER, et al.
Defendants-Appellants
(No. 01-1447)

ORDER

(Filed Nov. 16, 2001)

KIMBERLY JAMES, et al.,)
Intervening Defendants-Appellants)
(No. 01-1516))

BEFORE: MARTIN, Chief Circuit Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

These consolidated matters now come before the court upon the motion of Plaintiff-Appellee Grutter (Nos. 01-1447/1516) for an order terminating this court's previously entered stay of the injunction issued by the district court, and upon the joint motion of the University defendants to expand the time allotted for oral argument. By order of October 19, 2001 the court had directed that these appeals to be [sic] heard by the court sitting *en banc*.

On April 5, 2001 a panel of the court considered a motion of the University defendants in No. 01-1447 requesting a stay of the order of the district court. Having found that motion well taken, the court ordered the injunction stayed during the pendency of the appeal. The court has now considered the instant motion to terminate that stay and the response filed in opposition to the motion. A majority of the judges in regular active service having voted against the motion,

IT IS ORDERED that the motion to terminate the stay be, and it hereby is, DENIED.

Upon consideration of the defendants' motion to enlarge the time for oral argument and having considered as well the response to the motion, a majority of the judges in regular active service have voted that oral argument proceed as follows:

In Nos. 01-1333/1416/1418, *Gratz, et al. v. Bollinger, et al.*

Plaintiffs will have 20 minutes for argument

University defendants will have 15 minutes for argument

Intervening minority students will have 5 minutes for argument

In No. 01-1438, *Gratz, et al. v. Bollinger, et al.*

Intervening minority students will have 15 minutes for argument (including any argument time ceded to the University defendants)

Gratz appellees will have 15 minutes for argument

In Nos. 01-1447/1516, *Grutter v. Bollinger, et al.*

University defendants will have 20 minutes for argument (including any argument time ceded to intervening minority students)

Plaintiff will have 20 minutes for argument

Oral argument will be held in Cincinnati, Ohio on Thursday, December 6, 2001, beginning at 1:30 P.M. The argument will be held in Room 403, Potter Stewart United States Courthouse. The cases will be called as shown above.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green Clerk

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants.

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATHRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

JOINT SUMMARY OF UNDISPUTED FACTS REGARDING ADMISSIONS PROCESS

(Filed Dec. 13, 2000)

WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

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2445 M STREET, N.W.
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December 6, 2000

Hon. Patrick J. Duggan
United States District Court for
the Eastern District of Michigan
231 West Lafayette Boulevard
Detroit, Michigan 48234

Re: *Gratz, et al. v. Bollinger, et al.*, No. 97-75231

Dear Judge Duggan:

On behalf of the Defendants and the Plaintiffs, we hereby submit this Joint Proposed Summary of Undisputed Facts Regarding Admissions Process.

Sincerely,
/s/ John Payton/bb
John Payton

cc: Kirk Kolbo, Esq.
Theodore Shaw, Esq.
Philip J. Kessler, Esq.
Leonard M. Niehoff, Esq.
Kerry L. Morgan, Esq.

JOINT PROPOSED SUMMARY OF UNDISPUTED FACTS REGARDING ADMISSIONS PROCESS

1. The Parties

Defendant, the University of Michigan ("University") is a public institution of higher education located in Ann Arbor, Michigan. According to Defendants, "[a]dmission to the University is selective, meaning that many more students apply each year than can be admitted," and the University rejects many qualified applicants. (Defs.' 5/3/99 Br. at 4). For example, the University received some 13,500 applications for admission to the fall 1997 entering freshman class of its College of Literature, Science and the Arts ("LSA"), from which it elected to enroll 3,958 freshmen. (*Id.*) Among its stated admissions objectives, the University strives to compose a class of students from diverse racial, ethnic, cultural, geographic, and socioeconomic backgrounds and diverse talents. The University views diversity as essential to its educational mission. According to the University, diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." (Defs.' 5/3/99 Br. at 5). To facilitate diversity, it is undisputed that the University considers

race as one factor, among others, in making admissions decisions.

Plaintiffs Jennifer Gratz and Patrick Hamacher are Caucasian residents of the State of Michigan, who applied for admission into the 1995 and 1997 freshman classes of LSA, respectively. On January 19, 1995, Plaintiff Gratz was notified that a final decision regarding her admission had been delayed until early to mid April 1995, as she was considered by the University to be "well qualified, but less competitive than the students who ha[d] been admitted on first review." (Pls.' 4/9/99 Br. at 3). On April 24, 1995, Plaintiff Gratz was notified that the University was unable to offer her admission. In this letter, the University invited her to "place [her] name on [the] extended waiting list by completing and returning the enclosed form before May 10" because "[t]here may be a possibility that space will be available for a few students." (*Id.*). In the same letter, the University informed Plaintiff Gratz that it "expect[ed] to take very few students" from the extended waiting list and "recommend[ed] students make alternative plans to attend another institution." (*Id.*). The University did not receive an extended waiting list form from Plaintiff Gratz. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Plaintiff Hamacher was notified on November 19, 1996, that a decision regarding his admission was "postponed" until mid-April of 1997. According to the University's letter, a decision regarding Plaintiff Hamacher had been postponed because, "[a]lthough [his] academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission." (*Id.* at 3). On April 8, 1997, Plaintiff Hamacher's admissions application

was rejected, and he was informed, in substantially similar form as Plaintiff Gratz, about the extended waiting list. Plaintiff Hamacher did not accept the University's invitation to place his name on the extended waiting list by returning a completed form. Thereafter, Plaintiff Hamacher enrolled at Michigan State University.

The Defendant-Intervenors are seventeen African-American and Latino students who have applied for, or intend to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American and Latino students in Michigan. According to Defendant-Intervenors, the resolution of this case directly threatens African American and Latino students' access to higher education.

2. The Admissions Policies

The Office of Undergraduate Admissions ("OUA") oversees and implements the LSA admissions process and evaluates all applications to LSA. In order to promote consistency in the review of a large number of applications, OUA uses written guidelines in effect for each academic year. OUA generally expects admissions counselors to make admissions decisions in accordance with the guidelines, and counselors generally conform admissions decisions to the guidelines. There is some discretion to depart from the guidelines, and counselors are expected to discuss any departures from the guidelines with a supervisor. According to the University, because "admissions is more art than science," application review "is ultimately a matter of human judgment." (Defs.' 7/17/00 Br., Ex. H).

OUA considers many factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, under-represented minority status, personal achievement, and leadership. The University considers African-Americans, Hispanic-Americans, and Native Americans to be under-represented minorities. The role that race plays in the outcome of admissions decisions varies. There are cases in which race is dispositive in the outcome, and there are cases in which it is not dispositive. According to the University, all of the students admitted to the University are qualified to attend the University, and for the purpose of these motions, Plaintiffs assume this proposition to be true. It is undisputed that the University's consideration of race in the admissions process has the effect of admitting virtually every qualified under-represented minority applicant. The actual mechanics of the admissions policies at issue in this case are undisputed.

Academic Years 1995 and 1996

Upon receipt of an application, OUA clerks first recalculated an applicant's high school grade point average, based upon the applicant's academic courses from tenth and eleventh grades ("GPA 1"). The applications were then referred to admissions counselors, each of whom was assigned a specific geographic territory and reviewed all applications from that territory. The admissions counselors then evaluated a student's application according to the "SCUGA" factors, including the quality of an applicant's high school ("S"), the strength of an applicant's high school curriculum ("C"), an applicant's unusual circumstances ("U"), an applicant's geographical residence

("G"), and an applicant's alumni relationships ("A"). For some, but not all, of these factors, such as school quality and curriculum strength, counselors could add points to an applicant's GPA 1 score, ultimately culminating in what was referred to as an applicant's GPA 2 score. GPA 2 did not include all of the factors considered in the admissions process. It did not include any point value based on an applicant's Michigan residency or membership in an under-represented minority group.

In making admissions decisions, counselors referred to a set of "Guidelines" tables, with GPA 2 ranges represented on the vertical axis, and ACT/SAT scores represented on the horizontal axis. Each of these tables was divided into cells that included one or more possible courses of action, designated as admit, reject, delay for additional information, or postpone for reconsideration during final review. Counselors used the tables to guide their admissions decisions by comparing a particular applicant's GPA 2 score and ACT/SAT score with the appropriate cell of the table.

In 1995, the Guidelines consisted of four different tables, one for applicants from each of the following groups: (1) in-state, non-minority applicants; (2) out-of-state, non-minority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. Each individual cell on the 1996 tables, however, contained guideline courses of action for minority applicants and guideline courses of action for non-minority applicants.

The tables sometimes contained different guideline courses of action for minority applicants and non-minority

applicants in the same cell, so that in certain situations, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions decisions based upon their racial or ethnic status. For example, under the 1995 Guideline tables, Plaintiff Gratz, who had a GPA 2 score of 3.8 and an ACT score of 25, and was an in-state, non-minority applicant, fell within a cell calling for postponement of an admissions decision regarding her application, while an in-state or out-of-state minority student with the same GPA 2 score and ACT score would have fallen within a cell calling for admission.

From 1995 through 1998, the admissions guidelines also provided that qualified applicants from under-represented minority groups be admitted as soon as possible. Specifically, the guideline stated: "All qualified American Indians, Black/African American, and Hispanic/Latino American applicants will be admitted as soon as high probability of success can be predicted." (Pls.' Exs. Y & Z). As part of its efforts to recruit as many under-represented minorities as possible from what it considers to be a disproportionately small pool of qualified minority applicants, the University "tend[ed] not to postpone decisions on their applications," under the belief that minority applicants were more likely to enroll if promptly notified of their admission. (Defs.' 5/3/99 Br. at 17-18).

The University used a "rolling" admissions system for LSA, under which OUA reviewed and acted on applications throughout the admissions season, in contrast to a "precipice" system in which all admissions decisions are made on the same day, after all applications have been received and reviewed. A committee called the Enrollment Working Group ("EWG") was responsible for ensuring that the University met its target enrollment. It accomplished

this task by monitoring admissions against a myriad of objectives, including the achievement of a desired distribution of students among academic units, the appropriate balance between in-state and out-of-state enrollment, and the enrollment of a class with the attributes the University desires.

According to the University, the primary benefit of a rolling admissions system is that it permits early notification of admission, which is a powerful recruiting tool. The University states that it also carefully managed its rolling admissions system to afford consideration to those applications historically submitted later in the academic year, and that for the academic years 1995 through 1998, it used a technique that it called "protected seats" to accomplish this purpose. Certain groups – including athletes, foreign students, ROTC candidates, and under-represented minorities – were referred to as "protected categories." EWG projected how many applications from these protected categories the University was likely to receive after a given date by reference to how many were received from applicants in these groups after that same date in the prior year. Based on these projections, OUA then paced admissions decisions to permit full consideration of expected applications from these protected categories without over-enrolling the class. As explained by the University:

> This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it is used to admit qualified candidates remaining in the applicant pool, including applicants from the postponed pool or extended waiting list, applicants to other units, etc.

(Pls.' Ex. H at 13).

Academic Year 1997

For the 1997 academic year, the University used essentially the same procedure as in 1996, with one relevant modification. OUA gave consideration to race (and a few other factors listed below) in part through the tables and in part through GPA 2. Accordingly, GPA 2 was restructured to include additional point values (as shown in the SCUGA guidelines) for the "U" factor so that applicants could receive points for under-represented minority status, socioeconomic disadvantage, attendance at a high school with a predominantly under-represented minority population, or under-representation in the unit to which the student was applying (*e.g.*, men in nursing). OUA retained the two tables it used in 1996 for in-state and out-of-state residents, which contained guideline courses of action for applicants who benefited from the expanded "U" factor and applicants who did not. However, OUA modified the actual guideline courses of action for each cell in recognition of the fact that race was now included in GPA 2.

Under the 1997 procedures, Plaintiff Hamacher received a GPA 2 score of 3.0 and an ACT score of 28, placing him in a cell on the in-state applicant table, which generally called for postponement of the admissions decision. The guideline course of action for a minority applicant in the same cell on the table generally called for admission.

Academic Year 1998

Beginning with the 1998 academic year, OUA dispensed with the Guideline tables and cells and the SCUGA decimal point system, in favor of a selection index system, on which a potential applicant could score a maximum of 150 points based on a uniform set of criteria. The selection index scale was then divided linearly into ranges generally calling for admissions disposition as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). As was true with the tables, counselors were generally expected to and generally did conform admissions decisions to the selection index scale and retained some discretion to make departures from the scale after consulting with a supervisor.

An applicant received selection index points based upon the counselor's review of the application for a variety of factors, including high school academic GPA, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Most important for purposes of this action, under a "miscellaneous" category, an applicant was entitled to twenty points based upon his or her membership in an under-represented racial or ethnic minority group. According to the University, "[t]he development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions." (Defs.' 5/3/99 Br. at 57). "The difference between the selection index and the grids, therefore, has no legal significance." (*Id.*).

Academic Years 1999 and 2000

For the 1999 and 2000 academic years, OUA continued to use the selection index system, under which every applicant who is a member of an under-represented racial or ethnic minority group receives twenty points. (7/17/00 Kolbo Aff., Ex. D). However, starting with the academic year of 1999, the University created an Admissions Review Committee ("ARC"), comprised of members of OUA and the Office of the Provost, to provide an additional level of consideration beyond the initial counselor review for some cases as identified by the counselors. Counselors may, in their discretion, "flag" an application for ARC review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography. (Defs.' 7/17/00 Br. at 22; Ex. AA).

The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG. The parameters determine what admissions action – admit, defer, or deny – will be executed with respect to all applications that counselors have reviewed and entered into the OUA database at a given time. The ARC then meets periodically and reviews the files of applicants who were "flagged" by counselors, but who were not admitted based on the EWG parameters. After discussing these applications, the ARC decides whether to admit, defer, or deny the applicant.

In addition, starting with the academic year 1999, the University abandoned its prior approach of immediately admitting all qualified under-represented minorities, and now defers or postpones some of these applications. Similarly, the University has discontinued its use of "protected seats."